Supreme Court, U.S.
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In The Supreme Court of the United States

DÉJÀ VU OF CINCINNATI, LLC,

Petitioner,

v.

UNION TOWNSHIP BOARD OF TRUSTEES; KENNETH GEIS; UNION TOWNSHIP POLICE DEPARTMENT, and JIM PETRO, ATTORNEY GENERAL OF THE STATE OF OHIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of the fractured nature of this Court's ruling in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), what level of scrutiny should be imposed – and what standards are to be utilized in applying such scrutiny – upon a content-based regulation which by its very terms significantly reduces the engagement of First Amendment protected activities? In particular, what standards are courts required to apply in order to determine if such a regulation is sufficiently narrowly tailored?

2. Does a regulation which directly, and not incidentally, precludes the engagement of specified expressive activities on private property for 50% of each day violate the First Amendment?

3. Is an hours-of-operation regulation of "adult cabarets" impermissibly underinclusive under the First Amendment and/or violative of equal protection when it: A) exempts those cabarets which are licensed to sell alcoholic beverages from its proscriptions; and B) does not apply to other forms of "adult" businesses, such as bookstores and theatres?

4. The Union Township, Ohio, licensing scheme of "adult cabarets" contains what this Court referred to in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), as "civil disability provisions." These require the denial of a license application if the applicant or certain individuals associated with the applicant-business have been convicted of or pled guilty to certain crimes within a specified period of time prior to the submission of the application, and if the "applicant has violated these regulations." They also permit the revocation of a license "upon a finding of a violation of these regulations." Are such civil disability provisions

QUESTIONS PRESENTED – Continued

impermissible prior restraints upon speech and expression pursuant to *Near v. Minnesota*, 283 U.S. 697 (1931), an issue on which this Court granted certiorari in *FW/PBS v. City of Dallas*, but declined to resolve in that decision because of standing issues?

5. Is a licensing scheme of expressive activities impermissibly vague, and does it imbue licensing officials with unbridled discretion, when the licensee is required to exercise "adequate supervision" to "insure that employees comply at all times" with the provisions of the licensing regulations and with state law, and when the regulation requires every licensee, every person named in the application for a license, and every employee of an expressive business, to consent to and "cooperate" with a background investigation of that person, including any criminal record, whenever the licensing officials determine that there is "reasonable cause" to undertake such an investigation; a single violation of which can potentially result in the revocation of the license to engage in the specified First Amendment protected activities as well as the lifetime ban of being able to obtain such a license in the future?

LIST OF PARTIES BELOW/PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

(PURSUANT TO RULE 14.1(B))

All parties to the proceedings in the Sixth Circuit below are listed in the caption of this case. Although not a corporation, Petitioner Déjà Vu of Cincinnati, LLC states that a majority of its membership interest is held by Deja Vu Consulting, Inc., a Michiga· (non-public) corporation. There is no publicly held company owning 10% or more of the membership interest of Déjà Vu of Cincinnati, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the divided (7-5) en banc ruling of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 21, 2005.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Sixth Circuit (App. 1) is reported as *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 411 F.3d 777 (6th Cir. 2005), and the original panel opinion of the Sixth Circuit (App. 54) was reported at 326 F.3d 791 (6th Cir. 2003) (vacated). The Memorandum and Order and Preliminary Injunction of the United States District Court for the Southern District of Ohio granting in part and denying in part Plaintiff's motion for preliminary injunction (App. 94) is not reported, nor is the decision of the district court denying a motion to alter or amend (App. 123).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its en banc opinion in this matter on June 21, 2005. This petition is filed within ninety days of that date. This Court therefore has jurisdiction to review that decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RESOLUTIONS INVOLVED IN THIS CASE

United States Constitution, Amendment 1

> *Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .*

United States Constitution, Amendment 14, Section 1

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The various Ohio statutory provisions involved are reproduced in the Appendix, and include Ohio Rev. Code §§ 503.51-59 (App. 125), § 2907.09 (App. 133), § 2907.32 (App. 134), and various portions of § 2929 (App. 136-139). Union Township, Ohio, Resolution No. 99-15, and its successor, Resolution No. 00-22, are found at App. 140 and App. 155, respectively.

STATEMENT OF THE CASE

Plaintiff Déjà Vu of Cincinnati, LLC ("Deja Vu") operates a cabaret-style nightclub in Union Township, Ohio, that presents live clothed, "topless," and fully nude performance dance entertainment to the consenting adult public. It does not sell alcoholic beverages. Deja Vu opened on April 1, 1999, and continued the form of performances

that had been featured at the premises since December of 1995. It is the only facility within Union Township that provides this type of entertainment, with the closest comparable establishment being located approximately thirty-five miles away.

On August 10, 1999, Defendant Board of Trustees of Union Township ("Board") enacted Resolution No. 99-15 ("Res. 99-15"), which required the licensing (actually referred to as a "permit") of, and imposed certain regulations upon, "adult cabarets," those being businesses that feature persons who appear in a "state of nudity" (defined in Res. 99-15, § (A)(1) and (4) (App. 142)). Res. 99-15 was enacted pursuant to an enabling statute permitting local townships to adopt such regulations. *See* Ohio Rev. Code §§ 503.51-59 (App. 125-132).

Res. 99-15 required[1] the operators of adult cabarets to obtain a permit issued by the Board before opening for business. As part of the licensing process, the applicant would be compelled to submit certain information, including a statement that the applicant, and to the applicant's knowledge the persons named in the application, had never been convicted of or plead guilty to an offense under Ohio Revised Code Chapter 2907 (sex crimes),[2] or to a "substantially equivalent offense under a municipal

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[1] Following a ruling of the district court partially enjoining Res. 99-15, Union Township adopted Resolution 00-22 (App. 155), which rescinded and totally superceded Res. 99-15, and was the resolution which formed the basis of the Sixth Circuit ruling at issue. Unless otherwise specifically denoted as "Res. 99-15," the resolution citations contained in this petition will refer to the provisions of Resolution 00-22. Res. 99-15 and Resolution 00-22 are sometimes collectively referred to hereinafter simply as the "Resolution."

[2] Ohio Revised Code Chapter 2907 includes such crimes as public indecency (§ 2907.09 – (App. 133)) and pandering obscenity (§ 2907.32 – (App. 134)).

ordinance in Ohio, or under the laws of another state or territory or of the United States, or under a municipal ordinance in any such jurisdiction." Res. 99-15, § (D)(5)(g). Also mandated was "[a]uthorization for an investigation into the background, including any criminal record, of the applicant and any person or entity named in the application. . . ." Res. 99-15, § (D)(5)(i). No application was considered to be complete unless it contained all of this information. Res. 99-15, § (D)(5)(l).

Relevant to this petition, the Board could deny or refuse to renew a license if, among other things:

> a. The application is incomplete, contains any false information, or fails to comply with these regulations;
>
> * * *
>
> e. The applicant ***or any person named in the application*** for an initial or renewal permit to operate an adult cabaret ***within the past five years*** has been convicted of or pleaded guilty to an offense under Ohio Revised Code Ch. 2907 or a substantially equivalent offense under a municipal ordinance in Ohio, or under the laws of another state or territory or of the United States, or under a municipal ordinance in any such jurisdiction;
>
> f. The applicant ***or any person named in the application*** for an initial or renewal permit to operate an adult cabaret ***or any person employed at the adult cabaret***, has ***ever been*** convicted of or pleaded guilty to a violation of Ohio Revised Code § 503.53(C); or

> g. The applicant has violated these regulations.[3]

Res. 99-15, § (F)(2) (emphasis added) (App. 147-48).

After a permit is issued, a violation of the terms of the Resolution can also serve as the basis for the revocation of the permit. § (I). Petitioner will collectively refer to these sections as the "civil disability provisions."

The phrase "any person named in the application" as used in Res. 99-15 included, for example, the applicant (§ (D)(5)(c)); the statutory agent in Ohio for corporate applicants, as well as each shareholder owning more than two percent of the applicant's stock (§ (D)(5)(e)); each partner in a partnership (§ (D)(5)(c)); and each and every "employee." § (D)(5)(f) and § (A)(3).

The regulatory provisions of the Resolution, violations of which can serve as a basis for imposing a lifetime ban from being able to obtain an adult cabaret permit (*see* n.3, *supra*), include, for example, an owner, operator, or person in charge of the establishment failing to exercise "***adequate supervision***" in the performance of his or her duties to ensure that the employees comply at all times with the Resolution and the laws of Ohio. § (M)(4). Similarly, a violation occurs if an *employee* of the applicant or permittee fails to "cooperate with any background investigation under these regulations." § (N)(3).

In this regard, § (L) authorizes Union Township ("Township") personnel "[a]t any time there is reasonable cause to do so," to conduct a background investigation,

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[3] Unlike the violations as set forth in § (F)(2)(e), there is no "expiration" of this disabling factor. Once an applicant has violated any of the provisions of the Resolution – even just once – that person or entity can *never* obtain a permit to engage in this form of First Amendment activity in Union Township. This provision survives in Res. 00-22.

"including the criminal record, if any, of any permittee, person named in the application for a permit, employee of a permittee."[4] It is silent, however, as to why such background checks may be initiated or what purpose the results of such investigations may be utilized.

Section (M)(1) specifies the hours of the day during which adult cabarets may be open for business. They must close no later than midnight and open no earlier than noon (App. 165), a requirement that such establishments be closed for 50% of each day. An exception exists, however, for businesses that possess a license to sell alcoholic beverages. They are permitted to stay open until the closing time required under their permit. § (M)(1). A liquor facility similar to Deja Vu could remain open until 2:30 a.m. Ohio Rev. Code § 4301.22; Ohio Admin. Code § 4301:1-1-49.

Deja Vu filed a verified complaint for declaratory and injunctive relief and a motion for preliminary injunction seeking to enjoin enforcement of Res. 99-15. Jurisdiction was conferred pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202. The Attorney General of the State of Ohio was permitted to intervene in order to defend the constitutionality of the enabling statute. In response to an assertion that Plaintiff lacked standing to challenge the constitutionality of the civil disability provisions, Deja Vu submitted:

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[4] This is obviously grammatically incorrect, but is a direct quote from the Resolution.

1) The Affidavit of Jane Roe II[6] (App. 205), a female dancer who performed at Deja Vu and who in April of 1997, was convicted of "prohibited sexual or pornographic conduct" under Memphis (Tennessee) Ordinance No. 4-82;

2) The Affidavit of John Doe I (App. 209), a person possessing more than two percent of the ownership interest of Deja Vu who was convicted of certain obscenity-related offenses in the State of North Carolina in 1989, but who had since been licensed to sell and dispense alcoholic beverages in connection with a sports bar that he purchased; and

3) The Affidavit of John Doe II (App. 214), a gentleman employed as a disc jockey at Deja Vu, who pled no contest in 1992 to a misdemeanor obscenity offense under Ohio law arising out of his work as a D.J. at a *non*-"adult" bar during a lingerie modeling show, and who was only fined $30.00 (with no jail time imposed).

Jane Roe II would have precluded Deja Vu from obtaining a permit because she was convicted of one of the specified crimes within the time periods provided in Res. 99-15, § (F)(2)(e), and all three of these individuals would have prohibited Deja Vu from obtaining a permit since it could not submit the "no prior convictions" statement required by Res. 99-15, § (D)(5)(g).

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[6] The various Jane Roe and John Doe affidavits were submitted in order to protect the privacy rights of the affiants, with the actual affidavits identifying these individuals being filed under seal pursuant to court order.

In regard to the hours-of-operation restrictions, Deja Vu filed the affidavit of its General Manager, Jason Garvey. He attested that from his previous experience, the most popular time of the day for customers to visit the club was the late evening hours, and "specifically between 10:00 p.m. and 3:00 a.m." App. 220, ¶ 8. In addition, from figures that he had compiled, it was his opinion that in complying with the mandatory closing provisions, Deja Vu would suffer a 29.5% reduction in gross revenues, a 37% drop in performance dances sold (*i.e.*, the expression at issue), and a 20% reduction in customers coming into the facility. App. 220, ¶ 7.

After a hearing which consisted solely of attorney argument, the district court granted in part, and denied in part, Deja Vu's motion for preliminary injunction, ruling some portions unconstitutional but refusing to enjoin Res. 99-15 in its entirety. App. 94. Specifically, the court enjoined, as likely unconstitutional, certain inspection and shareholder disclosure requirements, but upheld the constitutionality of the civil disability and hours-of-operation provisions. It reached its conclusion with regard to the closing hour restrictions even though the court observed that "[t]o the extent that Plaintiff's contention is that the record contains no direct evidence that the operation of nude cabarets outside the hours prescribed by the Resolution has had negative impact upon the health, safety, and welfare of residents of Union Township, Plaintiff is correct." App. 107.

A motion to alter or amend was denied (App. 123), and Deja Vu filed a Notice of Appeal, with intervenor, the Attorney General of the State of Ohio, filing a Notice of Cross-Appeal. Union Township did not appeal any aspect of the district court's preliminary injunction ruling.

While the appeals were pending, Union Township enacted Resolution No. 00-22 ("Res. 00-22") to amend and replace Res. 99-15. It eliminated those provisions that the district court had determined were likely to be held unconstitutional, and also modified aspects of the application requirements and civil disability provisions found in the older ordinance. Specifically related to the matters at issue in this petition, Res. 00-22 amended §§ (F)(2)(e) and (f) by reducing the disability period to three years (from five) for offenses under Ohio Revised Code Chapter 2907, and imposing a five year disability for convictions of Ohio Revised Code § 503.53(C) (replacing the "has ever been convicted" language). App. 162. Moreover, the Resolution no longer requires the disclosure of employees in the application. Res. 00-22, § (D). These changes had the effect of rendering the convictions of Jane Roe II, and John Does I and II, to be irrelevant to the licensing of Deja Vu.

Following argument, the Sixth Circuit issued a panel opinion on April 24, 2003, which held that the Township's Resolution was unconstitutional because it did not provide for prompt judicial review of an adverse licensing decision. *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791, 800 (6th Cir. 2003). It further determined that the hours-of-operation provision violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (*id.* at 804); that the health and safety inspection provisions violated the Fourth Amendment (*id*); that certain disclosure provisions did not violate the First Amendment (*id.* at 806); that various provisions of the Resolution were not unconstitutionally vague (*id.* at 809); and that Deja Vu did not have standing to contest the civil disability provisions as a result of the enactment of Res. 00-22 (*id.* at 808). Circuit Judge Gilman dissented, but only with regard to the prompt judicial review and hours-of-operation equal protection rulings. *Id.* at 810-13.

Union Township and the Attorney General filed petitions for rehearing en banc solely related to the "prompt judicial review" issue, which were granted, and had the effect of vacating the entire panel ruling. *See* 6 Cir. R. 35. On rehearing en banc, the Sixth Circuit delivered a 7-5 opinion, split directly along party lines. Judge Gilman, this time writing for the majority, rejected each and every one of the Plaintiff's arguments on appeal. *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 411 F.3d 777 (2005).

Specifically, the majority rejected the panel opinion's conclusion that the Resolution failed to provide prompt judicial review, and found that Res. 00-22 and Ohio law satisfied First Amendment procedural concerns. *Id.* at 784. Similarly, inapposite to the panel opinion, the en banc majority upheld the hours of operation restrictions, finding that this provision left open ample alternative channels for communication because it permitted Plaintiff "to be open for twelve hours a day, six days a week," and thereby "pass[ed] First Amendment muster."[6] *Id.* at 791. Plaintiff's equal protection challenge to these restrictions was also rejected.[7] *Id.* at 792. But, in agreement with the panel opinion, the en banc majority concluded that Deja Vu did

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[6] By this comment, the Sixth Circuit actually upheld the constitutionality of closing requirements that are *more restrictive* than those imposed by Union Township, in that both resolutions permit adult cabarets to operate ***seven*** days a week, as opposed to the "six days a week" which the appellate court found to be constitutionally adequate.

[7] In the original panel ruling, Judge Gilman had concurred "in the majority's decision that § (M)(1) [the hours-of-operation provision] unconstitutionally infringes upon First Amendment rights. . . . " *Deja Vu of Cincinnati*, 326 F.3d at 813 (clarification added). In his en banc opinion, however, he changed his mind and found the restrictions fully constitutional. *Deja Vu of Cincinnati*, 411 F.3d at 790.

not have standing to challenge the civil disability provisions. *Id.* at 794-796. Finally, the majority also determined that the Resolution's provisions were not unconstitutionally vague. *Id.* at 798.

On the other hand, the Sixth Circuit *sua sponte* concluded that the Ohio Attorney General, as an intervenor in the underlying action, did not have standing to appeal the rulings of the district court relating to the health-and-safety inspections as neither the Plaintiff nor the Defendant had raised the issue of the constitutionality of the Ohio enabling statute or appealed the lower court rulings on this issue. Accordingly, it declined to review the district court's grant of a preliminary injunction against the enforcement of those provisions. *Id.* at 797.

Judge Clay, who had authored the panel majority opinion, and joined by Judges Daughtrey and Cole, concurred in part but dissented with regard to the prompt judicial review and hours-of-operation rulings. *Id.* at 798-805. Judge Martin, joined by Judges Daughtrey and Moore, also dissented in part, and while agreeing with Judge Clay, stated that they would not have reached the equal protection challenge to the hours-of-operation provision because they would have invalidated it on First Amendment grounds. *Id. at* 805.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THE LEVEL OF SCRUTINY THAT SHOULD BE EMPLOYED WHEN ANALYZING THE CONSTITUTIONALITY OF CONTENT-BASED LAWS WHICH *DIRECTLY* RESTRICT THE ENGAGEMENT IN PROTECTED EXPRESSION, AND THE NARROW TAILORING STANDARDS THAT APPLY TO SUCH SCRUTINY.

Historically, content-based regulations have been subject to strict scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Nevertheless, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court observed that if a *zoning regulation* was justified upon the concerns of the "adverse secondary effects" of adult entertainment businesses, it could be treated as being "content-neutral" and therefore subject only to intermediate scrutiny. Since then, however, this Court's foray into the secondary effects doctrine has resulted in a string of highly fractured plurality opinions (*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's, A.M.*, 529 U.S. 277 (2000); and most recently *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)), which have created considerable confusion in the courts below, particularly with regard to narrow tailoring requirements.

This Court should grant this petition to provide appropriate guidance to the inferior courts across this country on these critical, and highly litigated, matters of constitutional jurisprudence, which are particularly relevant to the constitutionality of hours-of-operation restrictions that, by definition, *directly* restrict the engagement of protected expression.

A. THE CIRCUIT COURTS ARE IN CONFLICT WITH REGARD TO THE NARROW TAILORING REQUIREMENTS THAT ARE TO BE APPLIED.

This Court has enunciated two standards of intermediate scrutiny when evaluating the constitutionality of regulations directed at sexual expression. In *Renton*, this Court concluded that "so-called 'content-neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. On the other hand, in *Pap's*, the Court observed that anti-nudity regulations, as applied to performance dance entertainment, were to be analyzed pursuant to the intermediate scrutiny standards as set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), with narrow tailoring under that test evaluating whether "the ***incidental*** restriction on alleged First Amendment freedoms is no greater than is ***essential*** to the furtherance of that interest." *Id.* at 377 (emphasis added). This Court has noted the four-factor *O'Brien* standard "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

Regardless, the narrow tailoring of intermediate scrutiny has been addressed in greatest detail by Justice Kennedy in his concurring opinion in *Alameda Books*. Distinguishing between the two *Renton* factors, he observes that while legislation may be utilized to ameliorate secondary effects, it cannot have the consequent effect of also reducing speech and expressive conduct; instead, it must "leave the quantity and accessibility of the speech ***substantially undiminished***." *Alameda Books*, 535 U.S. 444 (Kennedy, J., concurring) (emphasis added). According

to Justice Kennedy, this doctrine does not allow a municipality to "regulate the secondary effects of speech by ***suppressing the speech itself.***" *Id.* at 447 (emphasis added). Accordingly, any constitutional analysis directed at such regulations must address, as a separate and new component, how "speech will fare under the city's ordinance." *Id.* at 450.

These comments have become known to require the application of a "proportionality" test. *See Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1162 (9th Cir. 2003). Since *Alameda Books*, circuit decisions have generally considered Justice Kennedy's concurring opinion to be the constitutional holding of that plurality ruling pursuant to *Marks v. United States*, 430 U.S. 188, 193 (1977) ("the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"), and have applied his proportionality standards in a variety of contexts. *See, e.g., Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 722 (7th Cir. 2003) (applying to an ordinance that prohibited the sale, use or consumption of alcohol on premises of "Sexually Oriented Businesses"); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 861-62 (8th Cir. 2003) (applying to a public indecency ordinance); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003) (applying to both zoning and public nudity ordinances); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 637-38 (7th Cir. 2003), *cert. denied*, 125 S.Ct. 49 (2004) (applying to, among other things, a dancer/patron "buffer zone").

Although Deja Vu specifically raised the application of Justice Kennedy's proportionality test to the hours-of-operation restrictions contained in the Resolution, the majority opinion of the Sixth Circuit simply fails to address this issue.

In addition, in *Center for Fair Public Policy*, the Ninth Circuit recently held that although Justice Kennedy's concurrence is the constitutional holding of *Alameda Books* pursuant to *Marks*, it does *not* apply outside of a zoning context. Consequently, that court refused to impose a proportionality analysis to an hours-of-operation provision similiar to the one at issue here. 336 F.3d at 1163-64. *Cf.*, *World Wide Video of Washington, Inc. v. Spokane*, 368 F.3d 1186 (9th Cir. 2004) (utilizing Justice Kennedy's proportionality test in a *zoning* challenge). And, the Fifth Circuit has also had difficulty. In *Encore Videos, Inc. v. City of San Antonio*, 310 F.3d 812 (5th Cir. 2002), it concluded that Justice Kennedy's narrow tailoring analysis was the operative holding of *Alameda Books* pursuant to *Marks*, 310 F.3d at 818-19, but later withdrew that ruling and issued a new opinion which made *no reference whatsoever* to that determination, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), and then issued a third opinion "*clarifying*" *that*. 352 F.3d 938 (5th Cir. 2003).

This confusion in the Circuits (even *intra*-circuit) demonstrates the lower courts' need for further guidance by this Court. Significantly, the Ninth Circuit's ruling in *Center for Fair Public Policy*, as well as the Sixth Circuit's inaction on this issue, clearly conflicts with the decisions of other circuits – specifically, the Seventh, Eighth, and Eleventh – in regard to the standards which are to be applied when determining the constitutionality of an ordinance purportedly enacted to curb the secondary effects of adult entertainment establishments.

Also telling are comments from the *Alameda Books* district court following remand. That court has recently observed that Justice Kennedy's concurring opinion does indeed add "a new element to the *Renton* inquiry." *Alameda Books, Inc. v. City of Los Angeles*, Case No. CV 95 07771

DDP (C.D. Cal., June 10, 2005), slip op. at 19 (App. 247). And, in regard to the conflicting Ninth Circuit precedent, the judge observed that the appellate court "could not have intended" in *World Wide Video* that Justice Kennedy's proportionality test was merely a reiteration of the "alternative avenues of communication" evaluation in *Renton*. Slip op. at 23-24 (App. 251-52). Most relevant are the district court's comments, however, that the government's premise "cannot be merely that cutting adult speech in half would probably reduce secondary effects proportionately." Slip op. at 26 (App. 253-54). But this is *exactly* what hours-of-operation restrictions do.

In addition to the confusion of the standards to apply when utilizing intermediate scrutiny, comments of this Court fail to provide clear guidance with regard to the circumstances that would invoke application of strict scrutiny. Indeed, in *Alameda Books*, the district court had concluded that the zoning ordinance there was a content-based regulation subject to the highest scrutiny. This Court declined to rule on that issue, however, because it had not been addressed by the Ninth Circuit, and remanded for consideration of that matter. *Alameda Books*, 535 U.S. at 441.

But, in *Pap's*, the Court implied that the effect (or impact) upon expression may well determine the level of constitutional scrutiny to be applied. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." *Pap's*, 529 U.S. at 294. These types of hour-of-operation restrictions do not, and are not meant to, have a mere *de minimus* impact upon expression. Rather, they directly command that individuals and businesses express themselves less, and *substantially* so. Yet, both the Sixth and

Ninth Circuits have failed to consider this as being significant for constitutional analysis purposes, which further exemplifies that additional direction from this Court is needed.

B. DECISIONS ACROSS THE COUNTRY REFLECT THE LACK OF LOWER COURTS APPLYING ANY TYPE OF MEANINGFUL NARROW TAILORING REVIEW TO HOURS-OF-OPERATION RESTRICTIONS.

The Resolution at issue precludes adult cabarets from operating between midnight and noon, every day. But decisions across the country illustrate that these types of restrictions are inconsistent – and Petitioner argues arbitrary – in their proscriptions. *See, e.g., Mitchell v. Commission on Adult Entertainment Establishments*, 802 F.Supp. 1112 (D. Del. 1992), *aff'd*, 10 F.3d 123, 130-39 (3rd Cir. 1993) (adult establishments must close between 10:00 p.m. to 8:00 a.m., Monday through Saturday, and all day Sundays and state holidays); *Schultz v. City of Cumberland*, 26 F.Supp.2d 1128, 1145-46 (W.D. Wis. 1998), *rev'd on other grounds*, 228 F.3d 831, 846 (7th Cir. 2000) (adult facilities could operate only 10:00 a.m. until midnight, Monday through Saturday); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363-65 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) (adult establishments could not open before Noon every day and must close by 2:00 a.m., although with the court noting the narrow tailoring issue to be a ***"close question"***) (emphasis added); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 826 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (adult-oriented establishments may not be open between 2:00 a.m. and 8:00 a.m. Monday through Friday, between 3:00 a.m. and 8:00 a.m. on Saturday, and between 3:00 a.m. and noon on Sunday); *National Amusements, Inc. v. Town of Dedham*,

43 F.3d 731, 734-75 (1st Cir. 1995), *cert. denied*, 515 U.S. 1103 (1995) (prohibited licensed entertainment businesses (including traditional theater multiplex) from operating between 1:00 a.m. and 6:00 a.m.).

In addition, in its rulings regarding the Township's hours-of-operation restrictions, the en banc majority relied extensively on two of its previous decisions which upheld the constitutionality of Tennessee statutes (Tenn. Code Ann. §§ 7-51-1402 and 1405) that required adult-oriented establishments (with the exception of those presenting live entertainment) to be closed on Sundays and legal holidays, and other days between midnight and 8:00 a.m. *Deja Vu of Cincinnati*, 411 F.3d at 789-92 (*citing Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998) ("*Richland Bookmart I*") (upholding the statute against a First Amendment challenge); and *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570 (6th Cir. 2002) ("*Richland Bookmart II*") (upholding the same statute against an equal protection challenge), *cert. denied in both by* 537 U.S. 823 (2002)).[8] In its narrow tailoring analysis here, however, the Sixth Circuit makes no point of the fact that the statute in the two *Richland Bookmart* decisions allowed, with the exception of Sundays, adult entertainment establishments to be open for four additional hours per day.

The variety of the hours-of-operation provisions upheld in these rulings demonstrates that lower courts have failed to impose any meaningful form of narrow

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[8] As a result of the confusing federal precedent regarding both the First Amendment and equal protection issues discussed in this section, the Tennessee Supreme Court has recently agreed to review the constitutionality of the Tennessee statutes that were at issue in both *Richland Bookmart I* and *II* on independent state constitutional grounds in response to interlocutory applications filed by, among others, the undersigned. That case is now captioned as *Clinton Books, Inc. v. City Memphis*, No. W2003-01300-SCR11-CV.

tailoring. In addition, what this case and the other decisions referenced above also illustrate is that municipalities have become emboldened by the failure of the courts to impose any rigorous narrow tailoring scrutiny to these forms of regulations, with the number of prohibited hours creeping up to the extent that, here, Union Township has now reached the magic 50% closing plateau. And, if the Sixth Circuit is to be believed, it does not even matter if *that* threshold is exceeded, in that the appellate court upheld the restrictions on the erroneous assumption that Union Township only permitted operations on six, and not seven, days (*see* n.6, *supra*) – thus sanctioning *a 57% closing requirement for the entire week.*

This case therefore represents the *most restrictive* hours-of-operation ever permitted by a federal appellate court, and unless this Court addresses this issue, municipalities will continue to tighten their noose on forms of expression that some find to be offensive in an effort to basically preclude any meaningful engagement in such activities, with there being no indication that courts will anytime soon finally conclude that "enough is enough."

C. INCONSISTENT, ILLOGICAL, AND INDEED DIAMETRICALLY OPPOSITE EXCEPTIONS TO THESE TYPES OF HOURS-OF-OPERATION RESTRICTIONS ILLUSTRATE THAT REVIEW BY THIS HONORABLE COURT IS WARRANTED.

While the Resolution requires the closure of non-alcohol serving adult cabarets at midnight, alcohol-serving establishments are permitted to remain open until 2:30 a.m. The conclusion by the en banc majority that this difference in treatment violates neither First Amendment nor equal protection jurisprudence appears to turn the

secondary effects doctrine completely on its head, for this Court has consistently held that there are ***increased*** risks of secondary effects when combining nudity (or partial nudity) and alcohol. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (in upholding a regulation that banned topless dancing in establishments that were licensed to serve alcoholic beverages, the Court cited to the New York State Legislative Annual 150 (1977), which stated that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior"). *See also City of Newport v. Iacobucci*, 479 U.S. 92, 96 (1986); *California v. LaRue*, 409 U.S. 109, 114-15 (1972).

Accordingly, if anything, the government has ***greater*** power to restrict expression when combined with alcohol. Yet, here, Union Township exempts from its proscriptions those establishments which this Court has noted to be, if anything, *more highly associated* with adverse secondary effects.

Then, there is the difference in treatment between adult cabarets whose hours are regulated by Res. 00-22, and other types of adult establishments (such as bookstores and movie theatres) which are not. This should be contrasted with the earlier ruling of the Sixth Circuit in *Richland Bookmart II*, where the appellate court rejected an Equal Protection Clause challenge to the Tennessee statutory hours-of-operation scheme that applied to adult bookstores, but which also specifically exempted (by Tenn. Code Ann. § 1405) what the Union Township Resolution would define as "adult cabarets" (basically, the *direct opposite* of the regulations at issue here). Therefore, the Sixth Circuit appears to find no constitutional violation if bookstores are regulated more highly than live entertainment cabarets, or if just the opposite occurs.

On the other hand, directly contrary to the Sixth Circuit opinion in *Richland Bookmart II* is the Arizona Court of Appeals decision in *Empress Adult Video and Bookstore v. City of Tucson*, 59 P.3d 814 (Az. Ct. App. 2002), which ruled, on state constitutional grounds, that an hours-of-operation statute could not be applied to adult bookstores, but was constitutionally enforceable – because of the speech/conduct distinction – against live entertainment establishments. *Id.* at 829. And, if all of this is not confusing and arbitrary enough, the statute that the Arizona Court of Appeals invalidated as applied to adult bookstores in *Empress Video* is the ***same statute*** that the Ninth Circuit found to be *fully constitutional* in *Center for Fair Public Policy*.

The dissimilarity of regulation created by Res. 00-22 raises both underinclusiveness and equal protection concerns, and is indeed the "flip side of the coin" to the narrow tailoring concerns discussed *supra*. This Court has oft-noted the impermissible nature of exemptions to regulations of speech and expression, and the decision of the Sixth Circuit below appears to be at odds with those rulings.[9] While the en banc majority dismissed any

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[9] *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place"), and *id.* at 59 ("With rare exceptions, content discrimination in regulations of the speech of private citizens ***on private property*** or in a traditional public forum ***is presumptively impermissible, and this presumption is a very strong one***") (O'Connor, J., concurring) (emphasis added); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited' ") (*quoting Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (a law banning First Amendment activity by some but not by

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underinclusiveness concerns (*Deja Vu of Cincinnati*, 411 F.3d at 791), the Eighth Circuit, in a just released en banc decision of its own, observed that "the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles." *Republican Party of Minnesota v. White*, 416 F.3d 738, 762 (8th Cir. 2005) (*citing City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)). In addition, the decision of the Sixth Circuit is also in conflict with numerous decisions of state courts of last resort.[10]

These widely varying lower court decisions well-illustrate that further clarification from this Court is needed, and that the writ should therefore be granted.

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others "cannot be defended on the ground that partial prohibitions may effect partial relief")). *See also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95 & n.3 (1972); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-431 (1993); *Carey v. Brown*, 447 U.S. 455, 465 (1980).

[10] *See, e.g., H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 453 (Tenn. 1979) (an exemption of ideological speech from an ordinance which prohibited the throwing or depositing of commercial or non-commercial handbills on public streets was unconstitutional); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 756 (Tenn. 1979) (an exemption for "non-taxable entit[ies]" from the criminal proscriptions of the state obscenity statute was unconstitutional); *Wheeler v. Maryland*, 380 A.2d 1052, 1056-61 (Md. 1977), *cert. denied*, 435 U.S. 997 (1978) (exception to obscenity laws for certain non-officers and non-owners was unconstitutional); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 786 (Colo. 1985) (exception in obscenity to minors statute for museums, libraries, and bookstores operated by schools, colleges and universities was unconstitutional).

II. WHETHER "CIVIL DISABILITY" PROVISIONS IN LICENSING SCHEMES OF FIRST AMENDMENT PROTECTED BUSINESSES ARE CONSTITUTIONAL IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD FINALLY BE SETTLED BY THIS COURT.

For the following reasons, the writ should be granted so as to permit this Court to address the constitutionality of "civil disability" provisions such as the one at issue here, which can effectuate a *lifetime* ban on engaging in certain speech and expression-related activities.

A. THE PROCEEDINGS HERE DEMONSTRATE THAT THIS IMPORTANT ISSUE OF CONSTITUTIONAL JURISPRUDENCE WILL CONTINUE TO EVADE REVIEW BY THIS HONORABLE COURT.

The prior restraint aspects of these types of civil disability provisions were constitutionally important enough for this Court to have previously granted a writ to review this issue. Nevertheless, the Court ultimately concluded that no one had appropriate standing to challenge the restrictions in that case, and therefore declined to rule on the constitutionality of such provisions. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-36 (1990). Here, however, unlike the circumstances in *FW/PBS*, at the time of consideration by the district court, Petitioner had submitted the affidavits of three individuals – John Doe I, John Doe II, and Jane Doe II – who would clearly "disable" Deja Vu from obtaining a permit pursuant to Res. 99-15.[11]

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[11] Given that individuals must still consent to criminal background checks, a provision obviously meant to help administer the civil disability

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Only because of the passage of time, and more importantly the amendments effectuated by enactment of Res. 00-22 in a clear effort to divest Petitioner of standing to challenge these provisions, did the Sixth Circuit ultimately conclude that Deja Vu lacked standing to challenge the provisions. Equally important, given the time constraints of the three and five year disabilities contained in the newest version of the Resolution, this Petitioner may *never* have the opportunity to have this issue adjudicated by this Honorable Court. This case, which to-date has only progressed in the district court to the preliminary injunction stage, has already taken six years to reach this Court. Any future disabilities will, then, most likely have long-expired before they could be considered by this Court. This is the classic case of a challenge which is capable of repetition yet evading review. *International Organization of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991).

This Court has also cautioned against efforts to defeat injunctive relief by "protestations of repentance and reform." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1952). It is obvious that Union Township amended the Resolution to "defeat injunctive relief," and is always free to reinstate the repealed provisions absent judicial intervention here. *See also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (challenge not moot as "[i]n this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated").

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provisions, and applicants must still pay an application fee (§ (D)(4)) to defray the cost of administering, among other things, these provisions (§ (P)), Petitioner's claims are not moot because of the inapplicability of the prior convictions of Jane Doe II and John Does I and II.

Furthermore, given the fact that any violation of the Resolution can translate into a *lifetime* ban of engaging in certain expressive activities in Union Township (by, for example, merely failing to exercise "adequate supervision"), this Court should address this critical issue of constitutional jurisprudence to ensure that the First Amendment rights of Petitioner and others are not impermissibly chilled by the draconian threats imposed by these type of regulations.

B. THERE IS A SPLIT IN THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE, WITH SIXTH CIRCUIT PRECEDENT NOT ONLY CONFLICTING WITH DECISIONS OF OTHER APPELLATE COURTS, BUT ALSO CLEARLY DEMONSTRATING THE IMPERMISSIBLE CONSTITUTIONAL NATURE OF CIVIL DISABILITY PROVISIONS.

Although the Sixth Circuit concluded that Plaintiff did not have standing to challenge the civil disability provisions of the Resolution, its precedent on this issue is found in *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2002), *cert. denied*, 535 U.S. 1073 (2002), where the court upheld the constitutionality of similar restrictions.[12] That decision is, however, in direct conflict with the Seventh Circuit ruling in *Schultz v. City of Cumberland*,

[12] Other circuit decisions upholding various civil disability provisions include *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1017 (9th Cir. 2004); and *N.W. Enterprises, Incorporated v. City of Houston*, 352 F.3d 162, 195-96 (5th Cir. 2003); *but see* the Fifth Circuit's earlier opinion in *Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981) ("[p]ersons with prior criminal records are not First Amendment outcasts").

228 F.3d 831 (7th Cir. 2000), where that court ruled all civil disability provisions to be unconstitutional prior restraints upon expression. "[T]hese license ineligibility provisions ***absolutely disentitle classes of speakers from a category of expression***. They produce a complete ban on certain expression for a disqualified group of applicants, who, by definition, wish to speak, and such a drastic measure ***cannot be justified here as narrowly tailored to resist noisome secondary effects***." 228 F.3d at 852 (emphasis added). *See also Gayety Theaters, Inc. v. Miami*, 719 F.2d 1550, 1552 (11th Cir. 1983), and cases cited therein.

Numerous state courts of last resort agree with the Seventh Circuit's decision in *Schultz*. *See, e.g., Perrine v. Municipal Court*, 488 P.2d 648, 652 (Cal. 1971), *cert. denied*, 404 U.S. 1038 (1972) (ordinance unconstitutional as no showing had been made that persons convicted of enumerated sex crimes were "in any way disqualified to participate in the operation of a[n adult] bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess") (clarification added); *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 288-89 (Colo. 1995); *Alexander v. City of St. Paul*, 227 N.W.2d 370, 373 (Minn. 1975) (holding that the presumptive unconstitutionality of a criminal disability provision could be overcome only upon a showing that the continued operation of a business would present a "clear and present danger" of substantive evil); *Seattle v. Bittner*, 505 P.2d 126, 131 (Wash. 1973).

Even the Sixth Circuit precedent on this issue illustrates the precarious nature of these civil disability provisions. First, the decision in *Deja Vu of Nashville* seems to conflict (although the appellate court disagrees – *Deja Vu of Nashville*, 274 F.3d at 392) with it's earlier ruling in *City of Paducah v. Investment Entertainment*, 791 F.2d 463

(6th Cir. 1986), *cert. denied*, 479 U.S. 915 (1986), where it noted that the court had "found no precedent in which courts have upheld an obscenity law that provided for the revocation of obscenity dealers' business licenses." *Id.* at 467.

Second, the Sixth Circuit upheld civil disability provisions in *Deja Vu of Nashville* based upon the previous obscenity conviction of an individual by the name of Jerry Pendergrass. *Deja Vu of Nashville*, 274 F.3d at 390. Accordingly, he was then precluded from obtaining a license to engage in certain First Amendment protected activities in Nashville and Davidson County, Tennessee, as were certain corporations with which he was affiliated. However, the criminal conviction which served as the basis of Mr. Pendergrass's civil disability was *reversed on appeal. See State v. Pendergrass*, 13 S.W.3d 389 (Tenn. Crim. App. 1999). This reversal well-illustrates the unsound irreparable nature of these prior restraints and the need for examination by this Honorable Court.

C. THESE TYPES OF CIVIL DISABILITY PROVISIONS VIOLATE THE PRECEDENT OF THIS COURT.

Civil disability provisions obviously serve as a prior restraint on speech and expression, because they preclude an individual from engaging in future activities as a result of prior misconduct. Yet, in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316 (1980), this Court found unconstitutional a Texas law that prohibited exhibition of films by those who had repeatedly been found to have disseminated obscene material. The Court chastised the prohibition of expressive activities by stating that the "state made the mistake of prohibiting ***future conduct*** after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment,

the whole system must fail." *Id.* at 311 n.3 (emphasis added) (*quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)).

Similarly, in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), Justice Scalia, joined by Justices Kennedy and Thomas in a partial concurrence and partial dissent, observed that he knew of "no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct." *Id.* at 794 n.1.

Two other earlier "adult" speech cases also bring into significant question the constitutionality of civil disability provisions. In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the Court held that a nuisance abatement padlocking of an adult bookstore for non-speech related activities (prostitution and lewdness) did not constitute an impermissible prior restraint under *Near v. Minnesota*, 283 U.S. 697 (1931), because "the order would impose no restraint at all on the dissemination of particular materials, since respondents ***are free to carry on their book selling business at another location***. . . ." *Arcara*, 478 U.S. at 705 n.2 (emphasis added). In contrast, here, the applicant and the disabled individuals would not be free to carry on their expressive activities at another location in Union Township.

And, in *Alexander v. United States*, 509 U.S. 544 (1993), the Court concluded that the forfeiture provisions of the Federal RICO statute did not violate the First Amendment because " . . . [p]etitioner can go back into the adult entertainment business ***tomorrow***," and "the forfeiture order in this case imposes no ***legal impediment*** to – no prior restraint on – petitioner's ability to engage in ***any expressive activity he chooses***." *Id.* at 551 (emphasis added). The Township Resolution would not permit this, however, and indeed imposes an absolute "legal

impediment" to constitutionally protected expressive conduct.

III. CERTIORARI SHOULD BE GRANTED TO PERMIT THIS COURT TO CLARIFY THE SPECIFICITY REQUIRED OF LICENSING SCHEMES OF EXPRESSIVE ACTIVITIES.

This Court has long noted the necessity of ensuring that laws which impact upon protected expression are not impermissibly vague; that they give persons of common intelligence fair notice of what is proscribed; and that they provide minimal guidelines to govern the conduct of law enforcement officials so that they do not "pursue their personal predilections" in order to suppress speech they may find to be offensive. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). In addition, the Court has further discussed the impermissible nature of imbuing licensing officials with unbridled discretion in the granting of approval to engage in First Amendment protected activities. *FW/PBS*, 493 U.S. at 226. In fact, the assumptions that this Court made in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), were based upon no such unbridled discretion being present in these types of licensing laws. *Id.* at 783. Yet, this is not such a regulation.

As stated, § (M)(4) requires the owner, operator, or person in charge of the adult cabaret to exercise the (undefined) "adequate supervision" to ensure that employees comply at all times with the Resolution and the laws of Ohio. Similarly, § (L) permits the Board to order a background investigation, including any criminal record, of any "permittee, person named in the application for a permit, employee of a permittee [sic]," whenever there is "reasonable cause" to do so. But the Resolution provides no guidance to govern either law enforcement officials or the

Board in determining when they are permitted to undertake this action. Failure to abide by these regulations can result in revocation of the permit and a lifetime ban of obtaining a new one.

This petition should be granted to review these additional matters in order to ensure that appropriate constraints are placed upon governmental officials in enacting and administering these types of licensing laws.

CONCLUSION

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992). The jurisprudential standards regarding the matters discussed in this petition are certainly in doubt, and clear direction on these issues is sorely needed from this Honorable Court in order to protect expressive liberties from severe and indeed irreparable injury. The writ of certiorari should therefore be granted.

September 19, 2005

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411 F.3d 777

United States Court of Appeals,
Sixth Circuit.

DEJA VU OF CINCINNATI, L.L.C.,
Plaintiff-Appellant/Cross-Appellee,
v.
The UNION TOWNSHIP BOARD OF TRUSTEES et al.,
Defendants-Appellees,
Attorney General of the State of Ohio,
Intervenor-Appellee/Cross-Appellant.

Nos. 00-4420, 00-4529.

Argued: Dec. 8, 2004.
Decided and Filed: June 21, 2005.

ARGUED: H. Louis Sirkin, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, Ohio, Bradley J. Shafer, Shafer & Associates, Lansing, Michigan, for Appellant. Stephen P. Carney, Office of the Attorney General of Ohio, Columbus, Ohio, Lawrence Edward Barbiere, Schroeder, Maundrell, Barbiere & Powers, Cincinnati, Ohio, for Appellees. **ON BRIEF:** H. Louis Sirkin, Jennifer M. Kinsley, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, Ohio, Bradley J. Shafer, Shafer & Associates, Lansing, Michigan, for Appellant. Stephen P. Carney, Douglas R. Cole, Sharon A. Jennings, Office of the Attorney General of Ohio, Columbus, Ohio, Lawrence Edward Barbiere, Schroeder, Maundrell, Barbiere & Powers, Cincinnati, Ohio, for Appellees. Scott D. Bergthold, Law Office of Scott D. Bergthold, Chattanooga, Tennessee, Jack R. Burns, Bellevue, Washington, for Amici Curiae.

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

GILMAN, J., delivered the opinion of the court, in which BOGGS, C. J., BATCHELDER, GIBBONS, ROGERS, SUTTON, and COOK, JJ., joined. CLAY, J. (pp. 798-805), delivered a separate opinion concurring in part and dissenting in part, in which DAUGHTREY and COLE, JJ., joined. MARTIN, J. (p. 805), delivered a separate opinion dissenting in part, in which DAUGHTREY and MOORE, JJ., joined.

OPINION

GILMAN, Circuit Judge.

Deja Vu of Cincinnati, L.L.C. operates an adult cabaret in Union Township, Clermont County, Ohio. In 1999, Union Township enacted an ordinance (locally known as a resolution) in an attempt to minimize the adverse secondary effects of sexually oriented businesses. Deja Vu filed a complaint in the United States District Court for the Southern District of Ohio, alleging that the resolution violated the First and Fourteenth Amendments to the United States Constitution. The district court granted in part and denied in part Deja Vu's subsequent motion for a preliminary injunction. In response to this decision, Union Township amended the resolution to eliminate the provisions that the district court concluded were likely to be held unconstitutional. Union Township also eliminated other provisions that were not found to be suspect by the district court.

Deja Vu appealed, claiming that the district court erred in denying in part its motion for a preliminary injunction. The Ohio Attorney General, who intervened in the lawsuit to defend the constitutionality of Ohio's enabling statute, filed a cross-appeal. A divided panel of this

court ruled in favor of Deja Vu on the following two points: (1) that the resolution was an unconstitutional prior restraint on protected First Amendment expression because it failed to provide for prompt judicial review of an adverse licensing decision, and (2) that the resolution's more restrictive closing times for adult cabarets without liquor licenses as compared to those with liquor licenses was a violation of the First and Fourteenth Amendments. *Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trs.*, 326 F.3d 791 (6th Cir.2003).

We granted a rehearing en banc to reconsider whether the resolution is consonant with both the First and Fourteenth Amendments. For the reasons set forth below, we **AFFIRM** the district court's decision to deny in part the preliminary injunction, express **NO OPINION** on the district court's decision to grant in part the preliminary injunction in light of Union Township's subsequent modification of the resolution, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Deja Vu began operating an adult cabaret in Union Township in April of 1999. The nightclub features performances by clothed, semi-nude, and nude dancers.

In August of 1999, the Board of Trustees of Union Township (the Board) enacted Resolution No. 99-15 to regulate the licensing of cabaret-style nightclubs that feature adult entertainment. The resolution was enacted pursuant to the authority granted to Union Township by Ohio Revised Code § 503.51-59 for the purpose of protecting the "public health, safety and welfare." Resolution No. 99-15 § A. In particular, the resolution states that it was

passed on the basis of the Board's "review of other cities' studies and citizen comments regarding the secondary effects of sexually oriented businesses," which provided "convincing evidence" that such businesses "have a deleterious effect on both existing businesses around them and the surrounding residential areas . . . ." *Id.* § C.

Deja Vu filed its complaint in September of 1999, alleging that various provisions of Resolution No. 99-15 violate the First and Fourteenth Amendments to the United States Constitution. At the same time, Deja Vu filed a motion for a preliminary injunction. Consideration of the motion was stayed pending a decision by the United States Supreme Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (holding that public indecency ordinances may be treated as if they were content-neutral regulations). After the Supreme Court issued its decision in *City of Erie*, Deja Vu renewed its motion for a preliminary injunction. The district court granted the motion in part, enjoining Union Township from enforcing the sections of Resolution No. 99-15 that pertain to warrantless health and safety inspections of the premises, §§ (L)(1) and (M)(2), and to the disclosure of personal information concerning every partner and shareholder of the business, §§ (D)(5)(d) and (e). In October of 2000, the district court denied Deja Vu's motion to alter or amend the preliminary injunction.

Deja Vu filed a timely appeal in November of 2000. The Attorney General of Ohio, who intervened in the case to defend the constitutionality of Ohio Revised Code § 503.51-59, cross-appealed the district court's decision to enjoin the warrantless health and safety inspections. While the appeal and cross-appeal were pending, Union Township enacted Resolution No. 00-22 to amend and

replace Resolution No. 99-15, thereby eliminating those provisions that the district court had determined were likely to be held unconstitutional. The new resolution also modified other aspects of the personal-disclosure and civil-disability provisions found in the older ordinance. For the remainder of this opinion, the term "resolution" will be used to refer to current Resolution No. 00-22.

II. ANALYSIS

A. Standard of review

Whether a preliminary injunction should be granted is a decision left to the sound discretion of the district court. *Allied Sys., Ltd. v. Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm.*, 179 F.3d 982, 985-86 (6th Cir.1999). A district court, in deciding whether to grant an injunction, "abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir.1997). The following factors are to be considered by a district court in deciding whether to grant a preliminary injunction:

> (1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.

Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 888 (6th Cir.2000). Like the parties, the district court primarily focused on the first of these four factors – whether Deja Vu

is likely to succeed on the merits of its claims. We look at each of these claims in turn.

B. Prompt judicial review

1. Quasi-judicial proceeding

Deja Vu claims that the resolution is unconstitutional on its face because it fails to provide for prompt judicial review when an application for a license is denied. Citing *M.J. Kelley Co. v. City of Cleveland*, 32 Ohio St.2d 150, 290 N.E.2d 562 (1972), Deja Vu contends that the resolution does not allow for the type of "quasi-judicial proceeding" required for an appeal to lie pursuant to Ohio Revised Code § 2506. *Id.* at 563 (Syllabus ¶ 1) ("[A]dministrative actions of administrative officers and agencies not resulting from quasi-judicial proceedings are not appealable to the Court of Common Pleas under the provisions of R.C. 2506.01.").

In its original memorandum and order, the district court did not address Deja Vu's argument on this point. It did, however, rule on the issue after Deja Vu again raised the argument in a motion to alter or amend the judgment. After finding that the enabling legislation passed by Ohio to allow townships to regulate adult cabarets, Ohio Rev.Code § 503.57, "provides for appeal of a denial or revocation by the Board of Trustees of a permit to operate an adult cabaret," the district court denied Deja Vu's request for a preliminary injunction on this basis.

Under the resolution, an applicant for an adult cabaret license is permitted to "present information, evidence, and testimony to the Board, at a public hearing regarding the application." Resolution No. 00-22 § (F)(1). The Board must make a decision on the application within 30 days of

the application's submission. *Id.* As set forth in the Ohio Revised Code, "[a]ny person adversely affected by an order of the board denying or revoking a permit to operate an adult cabaret may appeal from the order of the board to the court of common pleas . . . in accordance with Chapter 2506[ ] of the Revised Code." Ohio Rev.Code § 503.57. Pursuant to Chapter 2506, "[e]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas," but only if the final order, adjudication or decision is the product of a "quasi-judicial proceeding." Ohio Rev.Code § 2506.01; *see M.J. Kelley Co.*, 290 N.E.2d at 563 (Syllabus ¶ 1).

Proceedings of an administrative agency "are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence." *M.J. Kelley Co.*, 290 N.E.2d at 563 (Syllabus ¶ 2). The Ohio Supreme Court determined that the administrative proceeding before it in *M.J. Kelley Co.* was not appealable pursuant to Ohio Revised Code § 2506.01 because, in determining the lowest bidder for a city contract, the Board of Control of the City of Cleveland "was not required to give advance notice of the meeting to the bidders[,] and bidders were not required to be present at such a meeting," and that, "[i]n fact, no notice" was given to bidders. *Id.* at 565.

In contrast, the resolution in the present case provides that the "Board shall hear any application for a permit or renewal permit, at a public hearing." Resolution No. 00-22 § (F)(1). Ohio Revised Code § 503.52 requires a board of trustees to publish "in at least one newspaper of general circulation in the township notice of the public hearings,

including the time, date, and place, once a week for two weeks immediately preceding the hearings." Moreover, the resolution states that, during the public hearing, "[t]he applicant shall have the opportunity to present information, evidence, and testimony to the Board . . . . " Resolution No. 00-22 § (F)(1). The resolution therefore satisfies the three requirements that define a "quasi-judicial proceeding": (1) a hearing, (2) notice, and (3) the opportunity to introduce evidence. *M.J. Kelley Co.*, 290 N.E.2d at 563 (Syllabus ¶ 2).

Deja Vu responds by citing the following four cases in support of its position that the resolution does not provide for adequate judicial review: *Local No. 2134 v. Bd. of Marion Township Trs.*, 33 Ohio App.3d 204, 514 N.E.2d 1386 (1986); *Banjoff v. Township of Carlisle Bd. of Trs.*, No. 98CA007079, 1999 WL 239416 (1999) (unpublished); *Ramacciatti v. City of Cleveland*, No. 66678, 1994 WL 326238 (Ohio App. 8 Dist.1994) (unpublished); and *City of Huber Heights v. Liakos*, No.2000 CV 03932 (Ohio Corn. Pl. Sept 25, 2000) (unpublished). All of these cases, however, are distinguishable on their facts from the present case.

In *Local No. 2134*, the Ohio Court of Appeals held that the proceedings on a grievance filed by several employees of Marion Township were not "quasi-judicial" in nature. *Local No. 2134*, 514 N.E.2d at 1389. The Ohio Court of Appeals relied on the undisputed fact that the Marion Township Board of Trustees did not hold a hearing or provide the employees with notice. *Id.* at 1388 (stating that "at no time did [the board] hold a hearing with notice given to plaintiffs concerning the grievance"). Unlike the employees in *Local No. 2134*, who challenged the grievance procedure as it applied to them, Deja Vu is challenging the

Union Township resolution on its face. Here the resolution clearly provides for a hearing, notice, and the opportunity to introduce evidence, so that the Board is acting as a quasi-judicial administrative body when it evaluates a request for a permit.

In *Banjoff*, the Ohio Court of Appeals held that an appeal was not available pursuant to Ohio Revised Code § 2506.01 because, unlike in the case before us, the administrative proceeding initiated by Banjoff to contest Carlisle Township's failure to appoint him as a full-time firefighter did not provide "for notice, a hearing, or the opportunity to present evidence . . . ." *Banjoff*, 1999 WL 239416, at *2. The Ohio Court of Appeals similarly held in *Ramacciatti* that an administrative proceeding conducted by Cleveland's Civil Service Commission did not constitute a "quasi-judicial proceeding" because "[n]o official notice of a hearing was provided," and the plaintiff was not afforded the "opportunity to subpoena witness[es], to cross examine witnesses, or to have testimony taken under oath." *Ramacciatti*, 1994 WL 326238, at *4.

Finally, in *City of Huber Heights*, the court of common pleas's decision concerning the licensing of a sexually oriented business hinged on the biased nature of the individual who was the relevant decisionmaker. *City of Huber Heights*, No.2000 CV 03932 (slip op.), at 12-13 ("[I]t is axiomatic that a hearing conducted before a biased individual . . . would not fulfill a requisite requirement of fundamental fairness that must pre-dominate in all quasi-judicial proceedings."). The court of common pleas emphasized that the hearing was no more than a "reconsideration" by the same individual – the City Manager-of his determination "'that probable grounds exist for denial, suspension, or revocation of a permit.'" *Id.* at 10-12 (quoting § 31 of

Huber Height's sexually oriented business ordinance). In affirming the court of common pleas's [sic] decision in *City of Huber Heights*, the Ohio Court of Appeals recognized that combining the investigative and adjudicative functions in a single individual, as opposed to an institutional agency, "undermines the quality of neutrality that is the central purpose of a review process" because it gives the individual "unbridled discretion." *City of Huber Heights v. Liakos*, 145 Ohio App.3d 35, 761 N.E.2d 1083, 1091 (Ohio App. 2 Dist.2001).

Unlike in *City of Huber Heights*, the decisionmaking authority under the Union Township resolution is vested in an administrative body rather than in an individual. The Union Township resolution also takes the further precaution of vesting the investigative function in the police department and the adjudicative function in the Board. Resolution No. 00-22 § (E) (providing that the police department is responsible for preparing a written report of the results of an investigation into the background of any applicant for a permit and anyone named in the application); *id.* § (F)(1) (stating that the Board is responsible for considering "any application for a permit or renewal permit, at a public hearing").

We therefore hold that the administrative hearing provided for by the resolution constitutes a "quasi-judicial proceeding" as that term has been defined by the Ohio Supreme Court in *M.J. Kelley Co.*, 290 N.E.2d at 563 (Syllabus ¶ 2).

2. Civil proceeding

Deja Vu also argues that the resolution does not provide for prompt judicial review because many decisions

by the Board to deny or revoke licenses will likely be "issued preliminary to or as a result of a criminal proceeding," and that such decisions are unreviewable under Ohio Revised Code § 2506.01. In providing for judicial review of the Board's determinations, the Union Township resolution permits any applicant who is denied a license, or any licensee whose license is revoked, to "appeal the action of the Board in accordance with chapter 2506 of the Ohio Revised Code." Resolution No. 00-22 §§ J(1)-(2). Ohio Revised Code § 503.57 further provides that "[a]ny person adversely affected by an order of the board denying or revoking a permit to operate an adult cabaret may appeal from the order of the board to the court of common pleas . . . in accordance with Chapter 2506.[01] of the Revised Code."

Notwithstanding these explicit provisions for judicial review of the Board's adverse licensing decisions, Deja Vu contends that most decisions will be beyond the review of the Ohio courts because Ohio Revised Code § 2506.01 prohibits appeals from "any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding." The resolution allows the Board to deny or revoke a license if it finds that an applicant or licensee has been convicted within the past three years of a sex offense under Ohio Revised Code § 2907, or convicted within the past five years of an offense under Ohio Revised Code § 503.53(C), which prohibits adult cabaret employees from touching, fondling, or displaying their own or another person's genitals, pubic area, buttocks, or (female) breasts. Resolution No. 00-22 § (I). Deja Vu insists that where a license is denied or revoked because of a conviction under Ohio Revised Code § 2907 or § 503.53(C), the Board's public hearings and subsequent licensing decision are

transformed into a "criminal proceeding" and thus shielded from judicial review by Ohio Revised Code § 2506.01.

We reject this far-reaching argument because we agree with the Ohio State Attorney General that, although not a model of clarity, the exclusionary language in Ohio Revised Code § 2506.01 is aimed at preventing criminal defendants from circumventing normal appellate procedures by precluding them from seeking interlocutory appeals in the Ohio Court of Common Pleas. Also evident is the fact that the denial or revocation of a license by the Board, even if *predicated* on a criminal act, is not "issued preliminary to or as a result of a criminal proceeding." This is because the Board's authority under the resolution is civil, not criminal. *See* Ohio Rev.Code § 503.51-59, the enabling statute that permits townships to regulate adult cabarets.

The dissenting opinion embraces Deja Vu's argument and insists that the majority's "analysis is fundamentally misguided . . . because Ohio law does not provide for any judicial review whatsoever for a substantial number of adverse licensing decisions." Dissenting Op. at 798. But the dissent is unable to cite any authority to support its broad interpretation of the exclusionary effect of Ohio Revised Code § 2506.01, nor are we aware of any adverse licensing decisions by the Board that have been denied judicial review in the Ohio Court of Common Pleas because the Board's decision was deemed to have been "issued preliminary to or as a result of a criminal proceeding."

The Supreme Court instructs us that "every reasonable construction must be resorted to, in order to save a

[legislative act] from unconstitutionality." *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895). Thus, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr,* 533 U.S. 289, 299-300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (citation and quotation marks omitted). This case presents such a situation. Absent any interpretation of § 2506.01 by the Ohio courts to the contrary, we must interpret the resolution in a manner that saves its constitutionality – that is, by concluding that Ohio Revised Code § 2506.01 permits an appeal from an adverse licensing decision by the Board whether or not the decision is predicated upon a criminal act.

3. Prompt judicial decision

Deja Vu further maintains that the resolution's provision for the issuance of a temporary license pending appeal of an adverse licensing determination does not provide for the "prompt judicial decision" that is required when the government imposes a prior restraint on the freedom of expression. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377, 403 n. 8 (6th Cir.2001) ("Merely preserving the status quo, however, is not sufficient. . . . The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme 'must *assure* a prompt judicial decision.'") (quoting *Freedman v. Maryland,* 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)) (emphasis in original).

The Supreme Court in *Freedman* held that three procedural safeguards are required in order to ensure that a prior restraint on the freedom of expression is constitutional. First, "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." 380 U.S. at 59, 85 S.Ct. 734. Second, "the procedure must also assure a prompt final judicial decision." *Id.* And third, the burden of proving that the expression in question is unprotected must rest on the government. *Id.* at 58, 85 S.Ct. 734.

The Sixth Circuit has held that "[l]icensing schemes in a city ordinance regulating sexually oriented businesses constitute a prior restraint that must incorporate at least the first two *Freedman* procedural safeguards." *Deja Vu of Nashville, Inc.*, 274 F.3d at 400-01 (holding that a Nashville ordinance regulating the licensing of sexually oriented businesses did not provide for a prompt judicial determination because it required "aggrieved applicants [to] proceed to court via a discretionary route" instead of allowing for an appeal as of right); *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion of O'Connor, J.) (stating that "the first two [*Freedman*] safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied"). In analyzing the constitutionality of an adult-business-licensing scheme, this court has recognized that "any system of prior restraint carries a heavy presumption

against its validity." *Deja Vu of Nashville, Inc.*, 274 F.3d at 391.

Deja Vu maintains that the resolution in question fails to provide for prompt judicial review because it does not mandate specific time limits within which the Ohio courts must complete their review of an adverse licensing determination. This issue of what procedures are necessary in the context of an adult-business-licensing scheme to "assure prompt judicial review of an administrative decision denying a license" was recently explored by the Supreme Court in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S.Ct. 2219, 2221, 159 L.Ed.2d 84 (2004). The city ordinance at issue in *Littleton* required "an applicant to provide certain basic information about the business," directed that a license be denied if an applicant had "been convicted of certain crimes within the prior five years," required the city to issue a decision within "about 40 days," and permitted the city's decision to be "appealed to the [state] district court." *Id.* at 2222, 2225 (alteration in original). After concluding that the "First Amendment does not require special 'adult business' judicial review rules," the Court accepted the city's invitation to modify *FW/PBS* by withdrawing its implication that *Freedman's* special judicial review rules apply to adult-business-licensing schemes. *Id.* at 2224 (finding that "Colorado's ordinary 'judicial review' rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming") (emphases in original).

The Supreme Court was faced with a statute in *Freedman* that prohibited the exhibition of any film until it was approved by a state censorship board, and the board's denial of a license would, "without any judicial

participation, effectively bar[] exhibition of any disapproved film, unless and until the exhibitor undert[ook] a time-consuming appeal to the Maryland courts and succeed[ed] in having the Board's decision reversed." *Freedman*, 380 U.S. at 54-55, 85 S.Ct. 734. As the Supreme Court explained in *Littleton*, the special characteristics of the statute before the court in *Freedman* necessitated that strict time limits be placed on judicial review in order to prevent "undue delay resulting in the unconstitutional suppression of protected speech." *Littleton*, 124 S.Ct. at 2225 (observing that the statute in *Freedman* created "a scheme with rather subjective standards and where a denial likely meant complete censorship") (quoting *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596); *see also Freedman*, 380 U.S. at 61, 85 S.Ct. 734 (finding "that films differ from other forms of expression," and warning "that the nature of the motion picture industry may suggest different time limits for a judicial determination").

In contrast, the adult-business-licensing ordinance before the court in *Littleton* did "not seek to *censor* material" and applied "reasonably objective, nondiscretionary criteria." 124 S.Ct. at 2225 (emphasis in original). Finding that an "adult business licensing scheme does not present the grave dangers of a censorship system," the court concluded that "ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm." *Id.* at 2224-26 (quotation marks omitted).

Like the ordinance in *Littleton*, the adult-cabaret-licensing resolution challenged by Deja Vu "applies reasonably objective, nondiscretionary criteria." *Id.* at 2225. The resolution states that the Board "shall approve the

application" for an adult cabaret license unless the application is false or incomplete, the applicant is under the age of 18, the operation of the cabaret would violate existing zoning laws, the applicant has committed certain civil offenses within the last three years, or the applicant is a business entity that is not registered to do business in Ohio. Resolution No. 00-22 § (F)(2)(a)-(g). Given that "[t]hese objective criteria are simple enough to apply and their application simple enough to review," and that Deja Vu has given us "no reason to doubt the willingness of [Ohio]'s judges to exercise the[ir] powers wisely so as to avoid serious threats of delay-induced First Amendment harm," we conclude that the resolution fulfills *Littleton*'s requirements for prompt judicial review. *Littleton*, 124 S.Ct. at 2225.

The resolution in the present case also provides for an additional First Amendment safeguard not contained in the ordinance that was upheld by the court in *Littleton* – the issuance of a temporary permit. Upon request, the Union Township Board must issue the applicant a temporary permit that will allow the operation of the adult cabaret "until such time as the appeal process . . . has been completed." Resolution No. 00-22 § (J)(1). The inclusion of this provision may well have been prompted by this court's decisions suggesting that cities could avoid constitutional infirmities in their adult-business-licensing schemes by issuing "provisional licenses" that "actually permit the communication of protected expression until a judicial decision is rendered." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir.2000) (invalidating an adult-cabaret-licensing scheme because it did not include such a provision); *see also Currence v. City of Cincinnati*, 28 Fed.Appx. 438, 445 (6th Cir. 2002) (per curiam) (unpublished) (noting that our

decisions have "suggested that a city enact an ordinance that: 1) requires a license to issue if the court does not decide the issue within a certain period of time; or 2) issues a provisional license to businesses or employees who seek judicial review").

Temporary permits are one way to comply with *Freedman's* requirement that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to the preservation of the status quo." *Freedman,* 380 U.S. at 59, 85 S.Ct. 734; *see also Deja Vu of Nashville, Inc.,* 274 F.3d at 403 n. 8 (finding that *Freedman's* requirement of "preserving the status quo" could be met by the issuance of temporary licenses that would allow "existing businesses to continue to operate until an adjudication on the merits" of their appeals).

Although the resolution under consideration in this case provides for temporary licenses to be issued while an appeal is pending, Deja Vu nevertheless maintains that the resolution fails to preserve the status quo. In support of its argument, Deja Vu points to the provision that requires an applicant operating under a temporary permit "to follow all other guidelines set forth in [the] resolution." Resolution No. 00-22 § (J)(1). We read this section as requiring Deja Vu to adhere to the regulations governing duly licensed cabarets, such as complying with the hours-of-operation provision or maintaining a list of employees with the Union Township Clerk.

Deja Vu is therefore correct that possession of a temporary license does not permit an adult cabaret to operate without any governmental regulation. Compliance with the resolution's minimal requirements, however, falls far short of the kind of "complete censorship" that

prompted the Supreme Court in *Freedman* to fashion the status quo requirement. *Littleton*, 124 S.Ct. at 2225. An adverse decision by the censorship board in that case would have barred the film from being shown during the pendency of the lengthy appeal. Here, Deja Vu may still operate as an adult cabaret even though it must close earlier than it would like. Such a regulation "is unlikely in practice to suppress totally" Deja Vu's protected expression. *Id.* (upholding the adult-business-licensing ordinance even though it did not provide for temporary licences [sic] because "[s]ome license applicants will satisfy the criteria even if others do not; hence the community will likely contain outlets that sell protected adult material"). We therefore conclude that, in providing for temporary permits, the resolution effectively preserves the status quo while appeals from the Board's adverse licensing decisions are pending.

C. Hours of operation

Deja Vu's next contention is that the hours-of-operation provision in the resolution violates the First Amendment. The district court denied Deja Vu a preliminary injunction on this issue after finding that the hours-of-operation provision "furthers an important or substantial interest in the protection of public safety," and that it "is reasonable and no more repressive of protected speech than is essential to serve Defendants' legitimate interests." In so ruling, the district court emphasized that Deja Vu is still allowed to operate for 84 hours each week.

To analyze Deja Vu's claim, we must first determine what level of scrutiny to apply to the resolution. We are guided by the Supreme Court's decision in *City of Erie v.*

Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), in which the Court held that "government restrictions on public nudity . . . should be evaluated under the framework set forth in [*United States v.*] *O'Brien* [391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968),] for content-neutral restrictions on symbolic speech." *City of Erie*, 529 U.S. at 289, 293, 120 S.Ct. 1382 (applying "the 'less stringent' standard from *O'Brien*" that is normally reserved for content-neutral regulations because the "State's interest in preventing harmful secondary effects is not related to the suppression of expression"). Under the four-part test outlined in *O'Brien*, "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S.Ct. 1673.

The resolution's hours-of-operation provision will pass muster under *O'Brien* so long as it imposes only "reasonable time, place or manner restrictions" on protected speech. *See Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (noting that the "four-factor standard of [*O'Brien*] for validating a regulation of expressive conduct . . . is little, if any, different from the standard applied to time, place, or manner restrictions"); *see also Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998) ("*Richland Bookmart I*") (analyzing a similar hours-of-operation provision "as a form of time, place and manner regulation"). To be valid, however, the resolution's hours-of-operation provision must (1) "serve a significant government interest," (2) be

"narrowly tailored" to that purpose, and (3) "leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293, 104 S.Ct. 3065.

Deja Vu contends that the hours-of-operation provision, which requires that adult cabarets close at midnight, does not serve a substantial governmental interest because there is no evidence that additional operating hours would lead to negative secondary effects. A similar argument was considered by this court in *Richland Bookmart I*, 137 F.3d 435, in which an adult bookstore challenged a statute regulating the operating hours of adult-oriented establishments. Like the resolution in this case, the statute in *Richland Bookmart I* had been enacted for the express purpose of minimizing the adverse secondary effects of sexually oriented businesses. The court found that "[r]educing crime, open sex and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a substantial government interest. . . . It is not unreasonable to believe that such regulation of hours of shops selling sex literature would tend to deter prostitution" and other negative secondary effects. *Id.* at 440 (quotation marks omitted).

For the same reasons, we reject Deja Vu's argument that the hours-of-operation provision does not further Union Township's substantial interest in protecting "the public health, safety and welfare." Union Township's decision to regulate the hours of operation was based upon studies of the adverse secondary effects of adult cabarets and other sexually oriented businesses. Resolution No. 00-22 §§ B & C. As the Supreme Court has recognized, "[t]he asserted interests of . . . combating the harmful secondary effects associated with nude dancing are undeniably

important," and such "regulation furthers the government interest . . . since crime and other public health and safety problems are caused by the presence of nude dancing establishments. . . ." *City of Erie*, 529 U.S. at 296, 300, 120 S.Ct. 1382.

Deja Vu contends, in the alternative, that the hours-of-operation provision is not narrowly tailored and that the resulting burden on protected First Amendment expression is greater than necessary to further Union Township's interest in minimizing the secondary effects of adult cabarets. In support of its position, Deja Vu points to the fact that the resolution permits adult cabarets that serve alcohol to stay open until 2:30 a.m., while those cabarets not serving alcohol are prohibited from being open past midnight. Resolution No. 00-22 § (L)(1) (requiring an adult cabaret to close at the later of midnight or the closing time required under its liquor permit). Because Deja Vu is an adult cabaret that does not sell alcoholic beverages, it can operate only until midnight. Deja Vu claims that such disparate treatment is unjustified, and points to the decisions of numerous courts that have concluded that sexually oriented businesses that serve alcohol actually present an *increased* risk of adverse secondary effects. *See, e.g., New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) ("Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior.").

That the resolution results in disparate treatment, however, does not necessarily raise First Amendment concerns. If there were no reasonable explanation for the resolution's distinction between the two types of cabarets, the inference could be drawn that Union Township was

acting with some invidious motive in passing the resolution. But this is not the case here, where Union Township can point to at least two plausible justifications for the different closing times. The first is that Union Township wanted to institute a midnight closing time for all adult cabarets, but was prevented from doing so by conflicting state liquor laws. Second, in enacting the resolution, Union Township relied upon research suggesting that the patrons of alcohol-free adult cabarets are often more unruly because these cabarets are frequently patronized later in the evening by customers who have become intoxicated at other establishments. Although Union Township could have elected to permit all adult cabarets to close at 2:30 a.m., thereby accommodating state liquor laws and eliminating the disparate treatment concerns, the First Amendment does not require Union Township to make this choice. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (holding that although "a regulation of the time, place, or manner of protected speech must be narrowly tailored[,] . . . it need not be the least restrictive or least intrusive means of doing so").

The dissenting opinion, however, notes that "the Township has cited no research whatsoever" in enacting the resolution. Admittedly, Union Township did not commission its own in-depth study, but "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

As stated in the preamble to the resolution, Union Township relied upon studies from 12 different cities in determining that enactment of the resolution would curtail unwanted secondary effects associated with adult cabarets, including increased crime. Union Township Administrator Kenneth Geis further attested that documented instances of intoxicated patrons engaging in "serious criminal activity in [a] cabaret" prior to the enactment of the resolution also led Union Township to conclude that tighter regulation of the hours of operation of adult cabarets would likely decrease criminal activity in the cabarets and surrounding neighborhoods. This evidence can be said to "fairly support [Union Township]'s rationale for its ordinance" and therefore meets the requirements of the narrow-tailoring test. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-439, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (rejecting a First Amendment challenge to a zoning ordinance because the adult-business plaintiffs failed to "demonstrat[e] that the municipality's evidence does not support its rationale or . . . furnish[] evidence that disputes the municipality's factual findings").

The resolution's hours-of-operation provision also "leave[s] open ample alternative channels for communication" of Deja Vu's protected expression. *See Clark*, 468 U.S. at 293, 104 S.Ct. 3065. In *Richland Bookmart I*, this court found that "[a]ccess to adult establishments [wa]s not unduly restricted" by legislation that required adult businesses to close at midnight. 137 F.3d at 441 (upholding the closing law because adult businesses could "still be open many hours during the week"). We similarly conclude that the resolution's hours-of-operation provision, which permits Deja Vu to be open for twelve hours a day, six days

a week, passes First Amendment muster. *See Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1159 (9th Cir.2003) (noting, in upholding a restriction on the operating hours of adult businesses, that "six other circuits have had occasion to consider similar restrictions, and all have found such restrictions to be constitutional").

In addition to its First Amendment challenge to the hours-of-operation provision, Deja Vu also argues that the resolution in question violates the Equal Protection Clause because it applies to the hours of operation of sexually oriented businesses that offer live entertainment but not to those that offer only pictorial representations. These other "sexually oriented businesses," such as adult bookstores and theaters, are allowed to stay open until 2:30 a.m. pursuant to a different Union Township resolution.

An analogous argument was addressed by this court in *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 572 (6th Cir.2002) ("*Richland Bookmart II*"), where legislation limited the operating hours of adult businesses, but made an exception for those businesses offering "only live, stage adult entertainment in a theater, adult cabaret, or dinner show type setting." The court found that the legislation was subject to the relaxed standard of rational-basis scrutiny "[b]ecause adult-bookstore owners are obviously not a suspect class entitled to heightened protection," and because an otherwise valid hours-of-operation restriction does not "implicate any fundamental right." *Id.* at 574.

Deja Vu does not seriously dispute that the resolution's hours-of-operation provision is subject to rational-basis review. Rather, it contends that the provision's distinction between live and nonlive entertainment is irrational. The fact that the resolution's hours-of-operation

provision contains an exception for establishments offering nonlive entertainment, however, is not a cause for concern under rational-basis review because a government "may implement its program of reform by gradually adopting regulations that only partially ameliorate a perceived evil." *Id.* at 577 (citation omitted); *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (finding that "the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . and apply a remedy there, neglecting the others" without violating the Equal Protection Clause). Because the hours-of-operation provision furthers a substantial government interest, as discussed above, and because there is no evidence of an impermissible motive on the part of Union Township, the resolution withstands Deja Vu's Equal-Protection challenge. *See Richland Bookmart II*, 278 F.3d at 576 (stating that "an exemption will rarely, if ever, invalidate a statute, unless the distinction created by the exemption is the result of invidious discrimination").

Deja Vu further argues, however, that the resolution violates the Equal Protection Clause because adult cabarets that do not have a liquor license are required to close at midnight, while adult cabarets that serve alcohol are permitted to remain open until the 2:30 a.m. closing time provided under their state liquor licenses. The dissenting opinion accepts this argument and proposes as a solution the more speech-restrictive alternative of "requir[ing] *all* cabarets to cease nude dancing at midnight." Dissenting Op. at 802 (emphasis in original). But because there is no evidence that Union Township enacted the resolution with an impermissible motive, and because Union Township may act incrementally to alleviate the harmful secondary

effects of adult cabarets, we reject this Equal Protection challenge to the resolution's hours-of-operation provision.

D. Disclosure of personal information

Deja Vu also claims that the resolution violates the First Amendment by requiring an applicant for an adult-cabaret license to furnish the Board with certain personal information. An applicant must provide his or her "full name, residence address and date of birth," Resolution No. 00-22 § (D)(5)(c), and an "[a]uthorization for an investigation into the background, including any criminal record, of the applicant and any person or entity named in the application. . . ." *Id.* at (D)(5)(g). In addition, "a list of employees" must be filed by a licensee that states "the name, date of birth, and position of each employee." *Id.* at (M)(3). Deja Vu maintains that requiring the disclosure of this information "as a prerequisite for being able to engage in First Amendment protected activities" is unconstitutional.

The district court applied the four-part test outlined in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to evaluate whether the information-disclosure provisions were permissible. After concluding that the above-mentioned disclosure requirements were sufficiently related to the legitimate governmental interests supporting the resolution and were not impermissibly broad, the district court upheld the provision. The district court did, however, strike down as impermissibly broad the portions of Resolution No. 99-15 that required the disclosure of personal information related to every partner or shareholder of an applicant. As amended, the resolution no longer contains these disclosure provisions and neither

Union Township nor the Attorney General has appealed the district court's holding on this issue. The amended resolution also omits the provision that required an applicant to disclose the residential address and social security number of each adult-cabaret employee. Resolution No. 99-15 § (D)(5)(f). As noted above, however, the resolution still requires a *licensee* to maintain a list of employees with the Clerk, including "the name, date of birth, and position of each employee." Resolution No. 00-22 § (M)(3).

On appeal, Deja Vu contends that the collection of personal information from an adult-cabaret applicant does not further a substantial governmental interest. This court has declared, however, that disclosure provisions even broader than those contained in Resolution No. 00-22 § (D) further a substantial governmental interest in minimizing the secondary effects of sexually oriented businesses. *See Deja Vu of Nashville, Inc.*, 274 F.3d at 393 (holding that an ordinance requiring applicants to "divulge such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years" furthers Nashville's "substantial governmental interest in eradicating the secondary effects of sexually oriented businesses"). This argument by Deja Vu is therefore without merit.

Deja Vu further maintains that the personal information gathered is not narrowly tailored to achieve Union Township's purported interest in promoting the general health, safety, and welfare of its citizens. In support of this argument, Deja Vu cites *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir.2000), in which the Seventh Circuit invalidated a provision requiring an applicant to

disclose his or her residential address, concluding that such information "is not narrowly tailored to the government's interest in the time, place or manner of adult entertainment." Deja Vu also claims that the collection of personal information creates a substantial danger because, pursuant to Ohio's Public Records Act, Ohio Revised Code § 149.43(A)(1) and (B), such disclosures would be considered to be public records. Given that public records can be reviewed by anyone, Deja Vu contends that the personal safety of individuals applying for an adult cabaret license might be jeopardized.

This tension between the legitimate governmental need for such information and the reasonable concerns of adult-cabaret licensees for their personal safety was resolved by this court in *Deja Vu of Nashville, Inc.*, 274 F.3d at 394. The court upheld the Nashville ordinance's required disclosures, but only after concluding that *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir.1998), prohibits public release of the applicants' names and current and past residential addresses. *Deja Vu of Nashville, Inc.*, 274 F.3d at 394. Like the plaintiffs in *Deja Vu of Nashville, Inc.*, the plaintiffs in the present case have presented "significant evidence that the requirement that applicants submit their names and . . . addresses to a public forum poses serious risks to their personal security." *Id.* We therefore conclude that the resolution's disclosure provisions are constitutional, but that the names and other information that are gathered pursuant to those provisions constitute protected private information that are exempted from Ohio's Public Records Act. *See* Ohio Rev.Code § 149.43; *see also Deja Vu of Nashville, Inc.*, 274 F.3d at 395 (holding that "all sexually oriented business license and permit applicants' names and current and past

residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act").

E. Civil disability

Deja Vu also claims that the civil-disability provisions included in the resolution violate the First Amendment. The current resolution states that an application will be denied if "[t]he applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret" has been convicted of or pled guilty to (1) a violation of Ohio Revised Code § 503.53(C) within the past five years, or (2) a sex offense covered by Ohio Revised Code § 2907 within the past three years. Resolution No. 00-22 § (F)(2)(e) and (f).

Ohio Revised Code § 503.53(C) prohibits certain sexual conduct from taking place within an adult cabaret, including restrictions on the display or touching of the entertainers' breasts, buttocks, or genitals. Along with sexual assaults and prostitution, Ohio Revised Code §§ 2907.02-.34 also prohibit public indecency, disseminating matter harmful to juveniles, pandering obscenity, and compelling the acceptance of objectionable materials. Because the civil-disability provisions implicate the behavior of "[t]he applicant or any person named in the application," Deja Vu claims that the ability to operate an adult cabaret is conditioned on the criminal record of not only the applicant, but also on the record of the owners, partners, and employees of the business.

In evaluating whether the civil-disability provisions are permissible, the district court applied the four-part test outlined in *United States v. O'Brien*, 391 U.S. 367, 88

S.Ct. 1673, 20 L.Ed.2d 672 (1968). The district court focused on (1) whether the civil disabilities actually further the asserted governmental interest, and (2) whether the burden imposed by the provisions is greater than necessary to accomplish its purpose. Union Township relied upon two studies that specifically focused on the adverse secondary effects of adult cabarets. After reviewing these studies, the district court concluded that the civil-disability provisions "further[] an important or substantial interest in the protection of public safety." The district court then decided that the civil-disability provisions do not "unduly restrict the right of persons in Union Township to express an erotic message and leaves available the alternative avenue of expression." (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 587, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)).

On appeal, the defendants contend that Deja Vu does not have standing to challenge the civil-disability provisions because "it has not yet applied for a permit and there is no allegation that the person or entity applying for the permit is subject to either of the[] disability provisions." To have constitutional standing necessary to maintain a lawsuit, "(1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be 'fairly traceable' to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury." *Deja Vu of Nashville, Inc.*, 274 F.3d at 389.

Deja Vu claims that it has standing on this issue because Jane Roe II, a female dancer who performs at Deja Vu, was "convicted in April 1997 of an offense substantially equivalent to Ohio Revised Code [§]2907 (obscenity and

various sexual offenses)." After the district court issued its decision, however, the original resolution was amended so that the employment restrictions now apply only to those individuals who have committed § 2907 sex offenses within the last three years. Resolution No. 00-22 § (F)(2)(e). Jane Roe II's 1997 conviction is thus insufficient to give Deja Vu standing to challenge the civil-disability provisions. For the same reason, neither the 1989 obscenity conviction of John Doe I, who has a two-percent ownership interest in Deja Vu, nor the 1992 obscenity conviction of John Doe II, who is employed by Deja Vu as a disc jockey, is sufficient to establish Article III standing for Deja Vu.

Moreover, Union Township points out that the resolution no longer requires the disclosure of employees in the application or provides for the revocation of a license based upon prior criminal convictions of employees. The original resolution provided that "[a]n application for an initial permit to operate an adult cabaret shall contain . . . [t]he full name, residence address, date of birth, and social security number of each person employed by the adult cabaret. . . ." Resolution No. 99-15 § (D)(5)(f). This requirement was eliminated, however, from the new resolution. Resolution 00-22 § (D). Although, as noted above, the resolution still requires a *licensee* to maintain a list of employees with the Clerk, Resolution No. 00-22 § (M)(3), employees are no longer "named in the application for an initial or renewal permit to operate an adult cabaret." *Id.* § (F)(2)(e)-(f). As a result, the civil-disability provisions do not apply to employees. The criminal record of Jane Roe II or any other employee is therefore insufficient to subject Deja Vu to a permit denial or revocation based on the civil-disability provisions. Deja Vu has thus not alleged

sufficient injury in fact to establish Article III standing on this issue.

We recognize that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). In the present case, however, Union Township eliminated the challenged provisions even though the district court held that there was a substantial likelihood that the provisions were in fact *valid*. This is in contrast to the more typical situation presented by *Deja Vu of Nashville, Inc.*, in which the municipality amended its ordinance only after certain provisions were voided by the district court, and where the municipality "repeatedly expressed its intention to reenact those portions of the Ordinance judged unconstitutional . . . at the earliest opportunity." 274 F.3d at 387. Under those circumstances, this court held that the amendments did not moot the issues on appeal. *Id.*

In the present case, the civil-disability provisions in question were not held unconstitutional by the district court, and Union Township has not announced an intention to reenact those provisions if the issue is dismissed as moot. The principle announced in *Mesquite* is therefore inapplicable. *See Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir.1997) (concluding that "the City's announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot" was "[c]ritical to the Court's decision" in *Mesquite*).

Deja Vu still contends, however, that the civil-disability provisions are unconstitutional because "the rapid turnover of entertainers and others in this industry

insures that this issue is capable of repetition, yet evading review. . . ." *See Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473, 111 S.Ct. 880, 112 L.Ed.2d 991 (1991). This argument focuses on the transient nature of *employment* by adult cabarets. But, as noted above, the resolution no longer requires the disclosure of employees in the application or provides for the revocation of a license based upon any prior criminal convictions of employees. The fact that Jane Roe II committed a sex crime more than three years ago is thus irrelevant to the determination of whether Deja Vu has standing.

For all of the above reasons, we conclude that Deja Vu does not have standing to challenge the resolution's civil-disability provisions.

F. Health and safety inspections

After concluding that Deja Vu was likely to establish that the warrantless health-and-safety-inspection provisions contained in §§ (L)(1) and (M)(2) of Resolution No. 99-15 violated the Fourth Amendment, the district court enjoined Union Township from enforcing those provisions. Resolution No. 99-15 § (L)(1) provided that "Township personnel or agents may at all reasonable times inspect permit premises to insure continued compliance with the laws of Ohio and these regulations." Section (M)(2) stated that "[t]he owner, operator, or person in charge of the adult cabaret shall allow state or local authorities, including law enforcement officers, access to any and all parts of the premises for the purpose of making any health or safety inspection pursuant to these regulations, and shall cooperate in any background investigation."

Union Township amended the resolution in response to the district court's ruling that Deja Vu was likely to prevail in its argument that the warrantless health and safety inspections violate the Fourth Amendment. The current resolution no longer contains those provisions, and Union Township has not appealed the district court's order enjoining it from performing health and safety inspections. Ohio's Attorney General, however, has filed a cross-appeal in the present case, asking us to reverse the district court's injunction on this ground. But the Attorney General's ability to seek appellate review of this issue, when neither Union Township nor Deja Vu has appealed from the district court's decision, is limited by his status as an intervenor. The controlling statute is 28 U.S.C. § 2403(b), which provides in pertinent part as follows:

> In any action, suit, or proceeding in a court of the United States to which a State . . . is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court . . . shall permit the State to intervene for presentation of evidence . . . and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

The Ohio Attorney General was permitted to intervene in the present suit in order to defend the constitutionality of Ohio's enabling statute, Ohio Revised Code §§ 503.51-59. This is the statute that permits townships to pass local ordinances regulating the operations of adult cabarets within their borders. In finding that the warrantless health and safety inspections provided for by the Union Township resolution were violative of the Fourth

Amendment, the district court made no ruling with respect to the constitutionality of the Ohio enabling statute. *See Int'l Paper Co. v. Inhabitants of the Town of Jay*, 887 F.2d 338, 342 (1st Cir.1989) ("[T]he relevant authority as well as the statutory language indicate that a local ordinance is not a statute within section 2403(b), and we are not aware of any substantial support for [a] broader interpretation.").

Absent from the district court's discussion is any mention whatsoever of Ohio Revised Code §§ 503.53 or 503.56, the sections of the enabling statute that permit townships to conduct health and safety inspections of adult cabarets. The district court concluded that the Union Township resolution was likely to be unconstitutional because the resolution required adult cabarets to submit to warrantless inspections "at all reasonable times." Resolution No. 99-15 § (L)(1). Because it failed to define "reasonable," the district court found that the Union Township resolution "vest[ed] unfettered discretion in township officials." Ohio's enabling statute, in contrast, contains no such language, and instead simply requires that adult cabarets "[u]ndergo periodic health and safety inspections to determine continual compliance with applicable health and safety codes." Although it enjoined the enforcement of the Union Township resolution, the district court left open the possibility that a township might enact a local resolution pursuant to the Ohio enabling statute that was in fact constitutional.

Because neither Union Township nor Deja Vu has raised this issue on appeal, and because the constitutionality of the Ohio enabling statute is not at issue, we decline to review the district court's grant of a preliminary injunction against the enforcement of the health-and-safety-inspection

provisions of now-repealed Union Township Resolution No. 99-15. *See Blair v. Shanahan*, 38 F.3d 1514, 1522 (9th Cir.1994) (holding that "28 U.S.C. § 2403(b) does not allow a State standing to participate in a motion where questions of constitutionality [of a state statute] are not among the issues argued"); *see also Ruotolo v. Ruotolo*, 572 F.2d 336, 339 (1st Cir.1978) ("There is . . . a difference between permitting the [§ 2403 intervenor] to play an active role during the pendency of private litigation, and permitting it to go forward with the litigation in its own right after the private parties have composed their differences.").

Even though we express no opinion on the constitutionality of the warrantless health and safety inspections, the district court's temporary injunction remains in effect, and we find nothing in the record to indicate that Union Township will attempt to reenact the provisions already deemed offensive to the Fourth Amendment. If the district court should abruptly change course on remand and fail to permanently enjoin Union Township from conducting the warrantless health and safety inspections, that determination would of course be reviewable by this court on appeal from a final judgment below.

G. Vagueness

Deja Vu finally claims that several of the resolution's provisions are unconstitutionally vague. Specifically, Deja Vu complains that the resolution completely fails to define the phrases "adequate supervision" in § (M)(4) or "reasonable cause" in § (L), and fails to adequately define the terms "employee" in § (A)(3), "touching" in § (N)(4)(b), or "uncover" in § (N)(4)(c).

"[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (holding that Rockford's antinoise ordinance was not unconstitutionally vague). Vague laws are problematic because they (1) "may trap the innocent by not providing fair warning," (2) fail to "provide explicit standards for those who apply them," and (3) threaten "to inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-09, 92 S.Ct. 2294 (quotation marks and footnote omitted). A law must therefore "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108, 92 S.Ct. 2294.

The Supreme Court has explained that, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.* at 110, 92 S.Ct. 2294. With this point in mind, we are of the opinion that, although the specific terms may not be defined with "meticulous specificity, . . . it is clear what the ordinance as a whole prohibits." *Id.* (citation and quotation marks omitted). Each of the terms challenged by Deja Vu is commonly used in both legal and common parlance, and is thus sufficiently clear so that a reasonable person can understand its meaning. We therefore conclude that the challenged terms are not unconstitutionally vague.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the district court's decision to deny in part the preliminary injunction, express **NO OPINION** on the district court's decision to grant in part the preliminary injunction in light of Union Township's subsequent modification of the

resolution, and **REMAND** the case for further proceedings consistent with this opinion.

CLAY, Circuit Judge, with whom Judges DAUGHTREY and COLE join, concurring in part and dissenting in part. I concur in Parts II.D (Disclosure of personal information), II.E (Civil disability), II.F. (Health and safety inspections), and II.G (Vagueness) of the majority opinion. For the reasons that follow, however, I dissent with respect to Parts II.B (Prompt judicial review) and Part II.C (Hours of operation).

I.

RIGHT TO PROMPT JUDICIAL REVIEW OF ADVERSE LICENSING DECISION

Deja Vu argues that Resolution No. 00-22 creates an unlawful prior restraint on its First Amendment right to free speech because it fails to provide for prompt judicial review of an adverse decision by the Union Township Board of Trustees ("Board" or "Township") to refuse to grant or renew, or to revoke, a permit to operate an adult cabaret. The majority rejects this argument, reasoning that not only does Ohio law provide for the same type of judicial review mechanism that the Supreme Court endorsed in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S.Ct. 2219, 2221, 159 L.Ed.2d 84 (2004), but also that the Resolution provides an additional First Amendment safeguard by requiring the issuance of a temporary permit pending judicial review. The majority's analysis is fundamentally misguided, however, because Ohio law does not provide any judicial review whatsoever for a substantial number of adverse licensing decisions.

Resolution No. 00-22 § (C) prohibits any person from engaging in, conducting, or carrying on an adult cabaret "without a valid, current permit" issued pursuant to the Resolution's regulations. Resolution No. 00-22 § (A)(1) defines an "adult cabaret" to mean an establishment "in which persons appear in a state of nudity in the performance of their duties," and Section (N)(4) prohibits an employee of an adult cabaret, "in the performance of his or her duties," from touching or fondling certain specified anatomical areas of his or her body or on any other person. The Resolution's preamble acknowledges that adult cabarets may engage in "activities protected by the First Amendment." Resolution No. 00-22, Preamble at ¶ E; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (holding that nude erotic dancing is constitutionally-protected, even though it "falls only within the outer ambit of the First Amendment's protection"); *Schultz v. City of Cumberland*, 228 F.3d 831, 836, 843 (7th Cir.2000) (holding that the term "performances" in a city ordinance that regulated "live performances which are characterized by the exposure of 'specified anatomical areas' or 'specified sexual activities' . . . undeniably denotes communicative content and applies explicitly to expression, not mere conduct"). Consequently, Union Township's licensing scheme is a classic "prior restraint" on constitutionally protected expression because the Resolution gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

Any system of prior restraint comes to this Court "bearing a heavy presumption against its constitutional validity." *Id.* at 558, 95 S.Ct. 1239 (internal quotation

marks and citations omitted). "The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties." *Id.* at 558-59, 95 S.Ct. 1239. Thus, "[t]he settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Id.* at 559, 95 S.Ct. 1239 (quoting *Freedman v. Maryland,* 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); other citations omitted). Among those required safeguards is that the censor must assure "a prompt final judicial determination" of the propriety of restraining the expression. *Id.* at 560, 95 S.Ct. 1239 (following *Freedman*). The purpose of this safeguard is to provide review of a censorship decision by an independent branch of government, which may be more responsive to constitutionally protected interests in free expression. *Id.* at 560-61, 95 S.Ct. 1239. Union Township's Resolution fails to provide this basic constitutional protection.

Under the Resolution, an individual desiring to operate an adult cabaret must file an application with the Board and authorize an investigation into his or her background, "including any criminal record, of the applicant and any person or entity named in the application, including authorization to conduct subsequent investigations to supplement or update the information." Resolution No 00-22 § (D)(5)(g). Upon receipt of the application, the chief of the Union Township police department conducts the prescribed criminal background check. *Id.* § (E).

After conducting a public hearing, the Board is required to approve the application for a permit, unless, *inter alia,* (1) in the past three years, the applicant or any person named in the application has been convicted of a

sex offense under Ohio Revised Code Ch. 2907 (prohibiting rape, sexual battery, unlawful sexual contact with a minor, sexual imposition, importuning, voyeurism, and public indecency); (2) in the past five years, the applicant or any person named in the application has been convicted of an offense under Ohio Revised Code § 503.53(C), which prohibits adult cabaret employees from touching, fondling, massaging, or displaying their own or any other person's genitals, pubic area, buttocks, or (female) breasts; or (3) the applicant has violated the Resolution's regulations, which, among other things, make it unlawful for an adult cabaret to employ a person under age 18 and prohibits the acts criminalized by Ohio Revised Code § 503.53(C). Resolution No. 00-22 §§ (F)(2)(e)-(g) and (N). The Board may revoke a permit after a public hearing "upon discovery of a violation" of the Resolution's regulations. *Id.* § (I).

The Resolution provides that an applicant denied a new permit or a renewal permit or an individual whose permit is revoked by the Board "may appeal the action of the Board in accordance with chapter 2506 of the Ohio Revised Code." Resolution No. 00-22 §§ (J)(1)-(2). Similarly, the Ohio Revised Code provides that "[a]ny person adversely affected by an order of the board denying or revoking a permit to operate an adult cabaret may appeal from the order of the board to the court of common pleas . . . in accordance with Chapter 2506 [] of the Revised Code." Ohio Rev. Code Ann. § 503.57. Although Chapter 2506 of the Code authorizes the appeal of a final order, adjudication, or decision of a municipality's board of trustees, it does not permit the appeal of "any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding." Ohio Rev. Code § 2506.01.

As explained below, the Resolution is structured so that the Board may refuse to grant new permits, refuse to renew permits, or revoke current permits based not only on a final criminal conviction for a sex offense (*e.g.*, rape, sexual battery, sexual imposition, voyeurism, public indecency, or touching or displaying one's genitals or buttocks in an adult cabaret), but also on merely the applicant's pending criminal charges for a sex offense or the fact that the applicant is the subject of a criminal investigation for such an offense. Consequently, many, if not most, of the Board's decisions to not renew or revoke permits for adult cabarets are likely to be unreviewable because they are issued "preliminary to or as a result of a criminal proceeding." *Id.*

First, new applicants for an adult cabaret permit must submit to a criminal background check by the Union Township police, and will be denied a permit if found to have pled guilty to, or been convicted of, an offense proscribed by Ohio Revised Code Ch. 2907 or § 503.53(C). Such application denials are the "*result of* a criminal proceeding" under the most common-sense interpretation of those words and, therefore, such denials are unreviewable. Ohio Rev. Code § 2506.01 (emphasis added). Similarly, current permit holders may have their permits revoked should the Board "discover[]" a violation of the Resolution, which includes the aforementioned criminal prohibitions. To the extent the Board revokes a permit as a consequence of a guilty plea or a conviction for one of these offenses, this decision is unreviewable because it is "issued . . . *as a result of* a criminal proceeding." Ohio Rev. Code § 2506.01 (emphasis added).

Second, a license revocation is unreviewable where the Board, working with the Union Township police

department and local prosecutors, discovers or becomes aware of a suspected criminal offense for which a conviction has not yet materialized, such as where the permit holder has been charged with a sex offense or is merely being investigated for such an offense *See, e.g.*, J.A. 114-15 (Affidavit of Union Township Administrator, Kenneth Geis, at ¶ 8) (explaining the Township's concerns undergirding a prior version of the Resolution, and recounting an incident at an adult cabaret where "a dancer and a patron were charged with prostitution and related offenses" and "[a]nother person was charged with abduction, gross sexual imposition and felonious sexual penetration for actions which occurred inside the cabaret"). The Board's decision not to issue or to revoke a permit on the ground that the applicant merely has been charged with, or is suspected of, violating the criminal laws against, for example, sexual imposition, voyeurism, public indecency, or touching or displaying genitals, is unreviewable as a decision issued "*preliminary to* . . . a criminal proceeding." *Id.* (emphasis added). In other words, under the present wording of the Resolution, mere allegations of certain sex offenses may lead to a nonappealable permit revocation.

Try as it might, the majority cannot evade the plain language of § 2506.01 which, as shown above, deprives the Ohio courts of jurisdiction over numerous adverse licensing decisions. The majority makes much of the fact that there appears to be no published Ohio authority denying judicial review of a licensing decision that was rendered preliminary to or as a result of a criminal proceeding. Yet, the majority fails to mention that there similarly is no published authority permitting judicial review of such a decision. Thus, the absence of Ohio authority proves nothing.

Moreover, it is the majority, not the dissent, which is "far-reaching" in ignoring the plain language of § 2506.01 and holding, without any citation to Ohio authority, that the Ohio legislature enacted § 2506.01 in order to prevent criminal defendants from circumventing normal appellate procedures by precluding them from seeking interlocutory appeals in the Ohio Court of Common Pleas. Although the majority is correct that we must resort to every reasonable construction in order to save a legislative act from unconstitutionality, the majority's construction of § 2506.01 is unreasonable because it is divorced from the clear and plain meaning of the statute's words and relies entirely on an invented legislative intent. Accordingly, the majority has not saved § 2506.01 through an alternative, reasonable construction. It has completely (and inappropriately) re-written the statute. *See Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir.1991) ("[T]he general federal rule is that courts do not rewrite statutes to create constitutionality.").

Because the purpose and structure of the Resolution authorizes the Township to revoke or not to renew an adult cabaret's license to operate as a result of an impending or final criminal proceeding, it follows that Ohio Revised Code § 2506.01 is simply not applicable and that Resolution No. 00-22 in reality does not provide for *any* judicial determination of an adverse licensing decision in many cases. For this reason, and because any system of prior restraint comes to this Court "bearing a heavy presumption against its constitutional validity," *Southeastern Promotions*, 420 U.S. at 558, 95 S.Ct. 1239 (internal quotation marks and citations omitted), I would hold that Union Township's licensing scheme amounts to an

unconstitutional prior restraint on Deja Vu's protected expression.

II.

HOURS OF OPERATION PROVISION

Under the First Amendment, content-neutral restrictions on expressive conduct, such as regulations of nude dancing or adult theaters for their adverse secondary effects, must be "narrowly tailored to serve a significant governmental interest." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *see also City of Erie*, 529 U.S. at 289-96, 120 S.Ct. 1382; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Such restrictions "need not be the least restrictive or least intrusive means" of serving the Township's legitimate content-neutral interest, but the means chosen cannot be "substantially broader than necessary" to achieve that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). By requiring non-alcohol-serving cabarets to close by midnight, but permitting alcohol-serving cabarets to offer nude dancing until 2:30 a.m., the Resolution's means of regulating the undesirable combination of nude dancing and alcohol consumption is substantially broader than necessary because it unnecessarily forecloses a substantial amount of constitutionally-protected expression.[1] Accordingly, the

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[1] *See* J.A. 67 (Affidavit of Jason Garvey, general manager of the Deja Vu club in Cincinnati) (stating that "the most popular time of the day for customers to visit are the late evening hours, and specifically between 10:00 p.m. and 3:00 a.m."; further opining that, based on his experience, the club would not recapture the dances that the customers

(Continued on following page)

district court abused its discretion[2] in failing to enjoin the Township's enforcement of the hours of operation provision.

Although the Township claims that the hours of operation regulation is "an attempt to close adult cabarets before the bars and taverns in the area close to avoid unruly and intoxicated men from entering during the late night hours," *Defs' Br.* at 30, it fails to adequately explain the disparate treatment accorded adult cabarets that have liquor licenses and those that do not. Because both Ohio law and the Resolution allow adult cabarets that serve alcohol to stay open until 2:30 a.m., there is no reason why the Resolution's greater limitation on the hours of operation of other adult cabarets is necessary to further the Township's interest in minimizing the secondary effects of sexually oriented businesses. As Deja Vu has pointed out, numerous courts have concluded that sexually oriented businesses that serve alcohol actually present an *increased* risk of adverse secondary effects. *See, e.g., N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) ("Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior."). The more restrictive

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would normally purchase after midnight from customers coming to the club earlier in the evening).

[2] We review the grant or denial of a preliminary injunction for an abuse of discretion. *Allied Sys., Ltd. v. Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm.*, 179 F.3d 982, 985 (6th Cir.1999) (citation omitted). "An abuse of discretion exists when the district court applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *Id.* at 985-86 (internal quotation marks and citation omitted). A district court's findings of fact are reviewed for clear error, and its conclusions of law *de novo*. *Id.* (citation omitted).

limitation on the hours of operation of adult cabarets that do not serve alcohol is thus unwarranted.

The Township's purported inability to regulate the hours of alcohol-serving cabarets due to conflicting state liquor laws[3] is irrelevant to the constitutional analysis. If the Township's true concern is limiting the secondary effects of nude dancing after midnight, then it logically would have required *all* cabarets to cease nude dancing at midnight, even though the cabarets that serve alcohol legally could remain open later pursuant to their liquor permits (but not offer nude dancing after midnight). Instead, the Resolution addresses the secondary effects illogically, by permitting patrons of alcohol-serving cabarets to increase their level of intoxication after midnight while simultaneously eliminating an alcohol-free option after midnight for people who have consumed liquor at other local bars and taverns. Under the Resolution, patrons of bars and taverns who wish to frequent an adult cabaret after midnight have no choice but to go to a cabaret that not only serves liquor but which already may have a contingent of intoxicated patrons in attendance, thereby exacerbating the purportedly volatile mix of alcohol and erotica. The Township's willingness to tolerate – and, indeed, encourage – this far more palpable and obvious risk of negative secondary effects demonstrates the complete mismatch between the Township's interest in ameliorating negative secondary effects and the means it has chosen to achieve that end.

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[3] *See* Maj. Op. at 790; Resolution No. 00-22 § M(1) ("Adult cabarets shall close no later than 12:00 Midnight or not later than the closing time required under its permit to sell alcoholic beverages, whichever is later. . . .").

Contrary to the majority's mischaracterization, I do not "propose[] as a solution the more speech-restrictive alternative" of requiring all cabarets to cease nude dancing at midnight. Maj. Op. at 12. I only point out the patently ridiculous and irrational manner in which the Township has attempted to address its purported goal of minimizing the secondary effects associated with the combination of nude dancing and alcohol. Because the Township has failed to articulate any logical, let alone empirically supported, basis for requiring non-alcohol-serving cabarets to close several hours earlier than those that serve alcohol, my only "proposal" is that the midnight closing time for non-alcohol-serving cabarets is unconstitutional. The implication of this proposal is that, on this record, non-alcohol-serving cabarets should be permitted to remain open at least as late as their alcohol-serving counterparts. Although the Township can act incrementally to alleviate negative secondary effects, it cannot act arbitrarily, which it has done in this case.

The majority also is misguided in asserting that Union Township has "relied upon *research* suggesting that the patrons of alcohol-free adult cabarets are often more unruly because these cabarets are frequently patronized later in the evening by customers who have become intoxicated at other establishments." Maj. Op. at 790 (emphasis added). The Township has cited no such research whatsoever. The only justification that Union Township has proffered on the subject of closing times is contained in the affidavit of Union Township's administrator, Kenneth Geis. The Geis affidavit states, in relevant part:

> The closing time of Midnight was included in an effort to insure the adult cabaret would close before the

> closing time of the bars and taverns in the area. There was concern that during the hours after Midnight there was a greater chance that intoxicated male patrons would cause a danger to themselves and to the employees of the adult cabarets and would cause increased criminal activity in the surrounding neighborhood.

(J.A. 105, ¶ 12.) The affidavit does not refer to any "research" showing that (a) alcohol-free cabarets are more unruly after midnight and (b) customers who have become intoxicated elsewhere are responsible for this purported increase in unruliness after midnight. Instead, the affidavit references only the speculative "concern" of some unidentified persons that there was "a greater chance" that drunken men would leave local bars after midnight, frequent adult cabarets, and become unruly. The Resolution's preamble also fails to mention any research in support of these hypotheses.[4]

Although the First Amendment did not require the Township, before enacting the Resolution, to conduct new studies or produce evidence independent of that already generated by other municipalities, it nevertheless had to

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[4] The majority correctly notes that Geis's affidavit documents instances of patrons engaging in criminal activity in an adult cabaret. Maj. Op. at 790-91. The majority fails to mention, however, that the criminal activity took place at an alcohol-serving cabaret and that the consumption of alcohol exacerbated the activity. *See* J.A. 104-05, at ¶ 8 ("There were numerous liquor law violations associated with the operation of the establishment. . . . A police officer attempting to effect an arrest of an intoxicated patron was seriously assaulted. The patron pled guilty to assault, resisting arrest, and DUI."). Thus, this empirical evidence does not support an earlier closing time for adult cabarets that do not serve alcohol. In addition, because Geis does not indicate the time of day during which this criminal activity took place, this empirical evidence also does not justify a midnight closing time.

rely on some "evidence" that was "reasonably believed to be relevant to the problem" that the midnight closing time for non-alcohol-serving cabarets was designed to address. *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925; *accord Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir.2002) ("In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification.") (citing *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir.1999)). The Township cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). Its "evidence must fairly support the municipality's rationale for its ordinance." *Id.* Here, there is no empirical evidence – let alone, "research" – that rationally supports a substantially earlier closing time for non-alcohol-serving cabarets. *Cf. Executive Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 796-97 (6th Cir.2004) (holding that zoning ordinance for adult book sellers was facially invalid because it was not narrowly tailored; reasoning that "the City has cited no basis, study or third party experience that would lead one to believe that such a broad ordinance is needed to control undesirable blight rather than merely being an attempt to control undesired speech").

For similar reasons, the Resolution's hours of operation provision runs afoul of the Equal Protection Clause of the Fourteenth Amendment. It does not bear "a rational relationship to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Deja Vu correctly argues that the Township seeks to regulate and possibly prevent operators of adult cabarets that do not serve

liquor from engaging in constitutionally protected conduct during certain times, midnight to 2:30 a.m., while arbitrarily excluding operators of adult cabarets that serve liquor from this hours of operation restriction. Such a difference in classification and application of the resolution is irrational, and thus unconstitutional under the Equal Protection Clause, because it fails to advance the Township's legitimate interests in minimizing the adverse secondary effects of sexually oriented businesses. *See id.* at 447-48, 105 S.Ct. 3249.

For the foregoing reasons, I would hold that the Resolution's hours of operation provision violates the First Amendment and Equal Protection Clause of the Fourteenth Amendment.

III.

CONCLUSION

In summary, the Township's Resolution is unconstitutional because it does not provide for judicial review of a significant number of adverse licensing decisions. As a consequence, it constitutes a prior restraint on freedom of expression as guaranteed under the First Amendment of the United States Constitution. In addition, Deja Vu is entitled to a preliminary injunction as to the Resolution's hours of operation provision because it violates both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. For all of the reasons set forth above, I would affirm in part and reverse in part the district court's order granting a preliminary injunction.

BOYCE F. MARTIN, Jr., Circuit Judge, with whom Judges DAUGHTREY and MOORE join, dissenting in part.

We join Judge Clay's dissent concluding that the ordinance amounts to an unconstitutional prior restraint on protected expression. The ordinance simply fails to provide for judicial review of a Board decision to not renew or to revoke a permit for an adult cabaret when the decision is issued "preliminary to or as a result of a criminal proceeding." We also agree with Judge Clay that the hours of operation provision fails the constitutional standard of being "narrowly tailored to serve a significant governmental interest." The ordinance therefore violates the First Amendment. Because we would invalidate the hours of operation provision on First Amendment grounds, we would not reach the parties' Equal Protection challenge.

326 F.3d 791

United States Court of Appeals,
Sixth Circuit.

DEJA VU OF CINCINNATI, L.L.C.,
Plaintiff-Appellant/Cross-Appellee,

v.

The UNION TOWNSHIP BOARD OF TRUSTEES et al.,
Defendants-Appellees,
Attorney General of the State of Ohio,
Intervenor-Appellee/Cross-Appellant.

Nos. 00-4420, 00-4529.

Argued June 21, 2002.
Decided and Filed April 24, 2003.
Rehearing En Banc Granted, Opinion Vacated Aug. 1, 2003.

H. Louis Sirkin (argued and briefed), Laura A. Abrams, Jennifer M. Kinsley, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, Bradley J. Shafer (argued and briefed), Andrew K. Wilkins, Shafer & Associates, Lansing, MI, for Plaintiff-Appellant Cross-Appellee.

Lawrence Edward Barbiere (argued and briefed), Schroeder, Maundrell, Barbiere & Powers, Cincinnati, OH, for Defendants-Appellees.

Sharon A. Jennings (argued and briefed), Office of the Attorney General of Ohio, Columbus, OH, Darrell M. Pierre, Jr. (briefed), Office of the Attorney General, Columbus, OH, for Intervenor-Appellee Cross-Appellant.

Before: CLAY and GILMAN, Circuit Judges; HAYNES, District Judge.*

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* The Honorable William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

CLAY, J., delivered the opinion of the court, in which HAYNES, D.J., joined. GILMAN, J. (pp. 810-813), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge.

Deja Vu of Cincinnati, L.L.C. operates an adult cabaret in Union Township, Clermont County, Ohio ("the Township"). In 1999, the Township enacted an ordinance (locally known as a resolution) in an attempt to minimize the adverse secondary effects of sexually oriented businesses. Deja Vu filed a complaint in the United States District Court for the Southern District of Ohio, alleging that the resolution violated the First and Fourteenth Amendments to the United States Constitution. The district court granted in part and denied in part Deja Vu's subsequent motion for a preliminary injunction. In response to this decision, the Township amended the resolution to eliminate the provisions that the district court concluded were likely to be held unconstitutional and also eliminated other provisions that were not found to be suspect by the district court. Deja Vu now appeals, claiming that the district court erred in denying in part its motion for a preliminary injunction. The Ohio Attorney General, who intervened in the lawsuit to defend the constitutionality of Ohio's enabling statute, filed a cross-appeal.

We now declare the Township's resolution to be unconstitutional on its face and as applied because it does not provide for prompt judicial review of an adverse licensing decision as required by *Freedman v. Maryland*,

380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and therefore constitutes a prior restraint on freedom of expression as guaranteed under the First Amendment of the United States Constitution. Moreover, unlike the district court, we also find that the Township's enforcement of the provision limiting the hours of operation of adult cabarets that do not have liquor licenses to less than that permitted for adult cabarets that do have liquor licenses, violates both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Like the district court, however, we agree that there was a substantial likelihood that the resolution's health and safety inspection provision violates the Fourth Amendment. We also agree with the district court that the disclosure of information provision does not violate the First Amendment, that the resolution's provisions were not unconstitutionally vague, and that Deja Vu does not have standing to contest the civil disability provision of the resolution.

Accordingly, as further explained below, we **AFFIRM** in part and **REVERSE** in part the district court's order granting a preliminary injunction, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Deja Vu began operating a cabaret-style nightclub in Union Township in April of 1999. The nightclub features performances by clothed, semi-nude, and nude dancers.

In August of 1999, the Board of Trustees of Union Township enacted Resolution No. 99-15 to regulate the licensing of cabaret-style nightclubs that feature adult entertainment. The resolution was enacted pursuant to the authority granted to the Township by Ohio Revised

Code § 503.51-59 for the purpose of protecting the "public health, safety and welfare." Resolution No. 99-15 § A. In particular, the resolution states that it was passed on the basis of the Board of Trustees's "review of other cities' studies and citizen comments regarding the secondary effects of sexually oriented businesses," which provided "convincing evidence" that such businesses "have a deleterious effect on both existing businesses around them and the surrounding residential areas. . . ." Resolution No. 99-15 § C.

Deja Vu filed its complaint in the United States District Court for the Southern District of Ohio in September of 1999, alleging that various provisions of Resolution No. 99-15 violate the First and Fourteenth Amendments to the United States Constitution. At the same time, Deja Vu filed a motion for a preliminary injunction. Consideration of the motion was stayed pending a decision by the United States Supreme Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (holding that Erie's public indecency ordinance is a content-neutral regulation that is a valid restriction on public nudity). After the Supreme Court issued its decision in *Erie*, Deja Vu renewed its motion for a preliminary injunction. The district court granted the motion in part, enjoining the Township from enforcing the sections of Resolution No. 99-15 that pertain to warrantless health and safety inspections of the premises, §§ (L)(1) and (M)(2), and to the disclosure of personal information concerning every partner and shareholder of the business, §§ (D)(5)(d) and (e). In October of 2000, the district court denied Deja Vu's motion to alter or amend the preliminary injunction.

Deja Vu filed a timely appeal in November of 2000. The Attorney General of Ohio, who intervened in the case to defend the constitutionality of Ohio Revised Code § 503.51-59, cross-appealed the district court's decision to enjoin the warrantless health and safety inspections. While the appeal and cross-appeal were pending, the Township enacted Resolution No. 00-22 to amend and replace Resolution No. 99-15, thereby eliminating those provisions that the district court had determined were likely to be held unconstitutional. The new resolution also modified other aspects of the personal disclosure and civil disability provisions found in the older ordinance. For the remainder of this opinion, the term "the resolution" will be used to refer to Resolution No. 00-22.

II. STANDARD OF REVIEW

The issue of whether a preliminary injunction should be granted is a decision left to the sound discretion of the district court. *Allied Sys., Ltd. v. Teamsters Nat'l Auto. Transporters Ind. Negotiating Comm.*, 179 F.3d 982, 985-86 (6th Cir.1999). This Court has said that a district court, in deciding whether to grant an injunction, abuses its discretion when it "applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir.1997). In *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892 (6th Cir.2000), we stated:

> In deciding whether to grant a preliminary injunction, a district court must consider and balance four factors: (1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable

> harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.

Id.

III. ANALYSIS

A. The resolution constitutes a prior restraint on freedom of expression

As we explained in *Nightclubs,*

> A "prior restraint" exists when speech is conditioned upon the prior approval of public officials. Although prior restraints "are not unconstitutional per se," they come to court bearing a heavy presumption against their validity. Prior restraints are presumptively invalid because they typically involve "two evils that will not be tolerated": (1) the risk of censorship associated with the vesting of unbridled discretion in government officials; and (2) "the risk of indefinitely suppressing permissible speech" when a licensing law fails to provide for the prompt issuance of a license.

202 F.3d at 889 (citations omitted). The Supreme Court, in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), held that three procedural safeguards are required to insure that a prior restraint on freedom of expression is constitutional. First, "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* at 59, 85 S.Ct. 734. Second, "the procedure must also assure a prompt final judicial decision. . . ." *Id.* Third, the burden of proving that the expression in question is unprotected must rest on the

government. *Id.* at 58, 85 S.Ct. 734. We reiterated these points in *Nightclubs* as follows:

> First, the decision whether to issue a license must be made within a "specified brief period," and, if judicial review is sought, the status quo must be preserved pending "a final judicial determination on the merits." Second, the scheme "must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." Third, a censorship scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the censor rather than the exhibitor.

Nightclubs, 202 F.3d at 889 (quoting *Freedman,* 380 U.S. at 58-59, 85 S.Ct. 734) (citations omitted).

Based upon *Freedman,* this Court in *Nightclubs* further stated:

> Thus, a licensing scheme must remove standardless discretion from government officials and contain two procedural safeguards: (1) the decision whether to issue a license must be made within a specified brief period, and the status quo must be maintained during that period and during judicial review, and (2) there must be a "guarantee of prompt judicial review."

Id. at 890 (citation omitted).[1] Applying these standards, we concluded in *Nightclubs* that Paducah's ordinance lacked

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[1] Circuit courts are currently divided about what constitutes "prompt judicial review." *See Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097, 1101 (9th Cir.1998) (noting that "'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,* 58 F.3d 988, 1000-01 (4th Cir.1995) (*en banc*) (holding that Justice O'Connor's plurality opinion in *FW/PBS* did not

(Continued on following page)

both of these safeguards. Specifically, we noted that "the ordinance fails to ensure that the City will issue a license within a brief specified time period during which the status quo is maintained," *id.*, and that there was no "guarantee of prompt judicial review." *Id.* at 891. In *Nightclubs*, we remanded the case for a determination of whether the licensing scheme was severable from the rest of the ordinance.

The analysis set forth in *Nightclubs* controls this case. The resolution in question is unconstitutional on its face and as applied because it does not provide for a prompt judicial determination of an adverse licensing decision as required by *Freedman*. Specifically, the provision in the resolution entitled "Prompt Judicial Review" fails to satisfy the procedural safeguards necessary to avoid an unconstitutional prior restraint of expressive activity protected by the First Amendment.

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relax the *Freedman*'s requirement of a "prompt final judicial decision"). *But see Boss Capital, Inc. v. Casselberry*, 187 F.3d 1251, 1255-57 (11th Cir.1999) (concluding that "prompt judicial review only means *access* to prompt judicial review") (emphasis in original); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994) (same); *Graff v. Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (*en banc*) (same); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993) (same). Contrary to the Ohio Attorney General's assertion, the Supreme Court has not yet resolved this circuit split. *Clark v. City of Lakewood*, 259 F.3d 996, 1005 n. 4 (9th Cir.2001) ("The Supreme Court has not yet ruled on whether prompt judicial review requires a prompt judicial determination on the merits or only prompt access to court review."). This is confirmed by the Supreme Court in the recent case of *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002), where the Court stated that its decision did not reach the still unresolved question of "whether the requirement of prompt judicial review means a prompt judicial determination or the prompt commencement of judicial proceedings."

The provision in question, Resolution No. 00-22 § (J)(1), provides:

> Pending the outcome of the appeal, the applicant, upon written request filed with the Clerk, shall be issued a temporary permit (without charge). The temporary permit will allow the operation of the Adult Cabaret until such time as the appeal process as set forth in Chapter 2506 of the Ohio Revised Code has been completed.

The resolution also provides that "[a] permittee, whose permit is revoked, . . . may appeal the action of the Board in accordance with chapter 2506 of the Ohio Revised Code." Resolution No. 00-22 § (J)(2). Upon request, the Township's Board of Trustees must issue the applicant a temporary permit that will allow the operation of the adult cabaret "until such time as the appeal process as set forth in Chapter 2506 of the Ohio Revised Code has been completed." *Id.* The temporary permit, however, requires the applicant to abide by the other guidelines set forth in the resolution. *Id.*

As set forth in the Ohio Revised Code, "[a]ny person adversely affected by an order of the board denying or revoking a permit to operate an adult cabaret may appeal from the order of the board to the court of common pleas. . . ." Ohio Rev.Code Ann. § 503.57. Pursuant to the statute, "[t]he appeal shall be in accordance with Chapter 2506[ ] of the Revised Code." *Id.* In relevant part, Ohio Revised Code § 2506.01 permits an appeal of a "'final order, adjudication, or decision' . . . but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is

issued preliminary to or as a result of a criminal proceeding."

1. The resolution allows for a "quasi-judicial proceeding" required for an appeal

In this case, Deja Vu, citing *M.J. Kelley Co. v. City of Cleveland,* 32 Ohio St.2d 150, 290 N.E.2d 562 (1972), first claims that the resolution does not allow for the type of "quasi-judicial proceeding" required for an appeal to lie pursuant to Ohio Revised Code § 2506. *Id.* at 563, Syllabus ¶ 1 ("[A]dministrative actions of administrative officer and agencies not resulting from quasi-judicial proceedings are not appealable to the Court of Common Pleas under the provisions of R.C. 2506.01."). In *M.J. Kelley Co.,* 290 N.E.2d at 563, Syllabus ¶ 2, the Ohio Supreme Court explained that the proceedings of an administrative agency "are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence." The Ohio Supreme Court held that the administrative proceeding before it was not appealable pursuant to Ohio Revised Code § 2506.01 because, in determining the lowest bidder for a city contract, the Board of Control of the City of Cleveland "was not required to give advance notice of the meeting to the bidders and bidders were not required to be present at such a meeting," and that, "[i]n fact, no notice" was given to bidders. *Id.* at 565.

Section (F)(1) of the Township's resolution states that the Board of Trustees "shall hear any application for a permit or renewal permit, at a public hearing" and render a decision within thirty days of receiving an application. As the Ohio Attorney General has pointed out, Ohio

Revised Code § 503.52 requires a board of trustees to publish "in at least one newspaper of general circulation in the township notice of the public hearings, including the time, date, and place, once a week for two weeks immediately preceding the hearings." Moreover, during the public hearing, "[t]he applicant shall have the opportunity to present information, evidence, and testimony to the Board. . . ." Resolution No. 00-22 § (F)(1). The resolution therefore satisfies the three requirements that define a "quasi-judicial proceeding" – (1) a hearing, (2) notice, and (3) the opportunity to introduce evidence. *M.J. Kelley Co.*, 290 N.E.2d at 563, Syllabus ¶ 2. Thus, we conclude that the resolution allows for a "quasi-judicial proceeding" necessary for an appeal under Ohio Revised Code § 2506.

2. The resolution does not provide for "prompt judicial review"

Nevertheless, we hold that the resolution fails to provide for a prompt judicial determination of the Board's administrative action, and thus constitutes a prior restraint under the exercise of expressive thought. First, the provision in question, Resolution No. 00-22 § (J)(1), fails to ensure that the Township will decide whether to issue a new permit or a renewal permit or to reconsider the revocation of an existing permit within a "specified brief period." *Nightclubs*, 202 F.3d at 890. Specifically, the provision fails to require specific time limits for the completion of judicial review. Indeed, in this respect, the Township's resolution is more defective than Paducah's ordinance in *Nightclubs* because at least Paducah's ordinance stated that it would approve or deny the license application within ten days, although the ordinance also stated that no license would issue until the premises

passed a series of building inspections. Further, the Township's provision in the instant case does not explicitly specify that the status quo must be maintained during that period and during judicial review. Having to operate under such circumstances for an extended or indefinite period of time, during which a temporary permit would purportedly be issued, could have an extremely chilling effect on the operator's First Amendment rights. Moreover, because the temporary permit procedure is flawed, as discussed below, it is entirely conceivable that the failure to take action within a "specified brief period" on an appeal under the ordinance is likely to result in a violation of the First Amendment rights of an operator whose permit is revoked or not renewed. *Nightclubs*, 202 F.3d at 890.

Nonetheless, the dissent asserts that the issuance of a provisional license pending judgment by a court solves both problems of maintaining the status quo and guaranteeing prompt judicial review. However, while there is a temporary licensing procedure, there is no specific requirement that the status quo be maintained during a specified brief period, no time limits, and no guarantee of prompt judicial review.

There is also the further problem that the temporary licensing procedure itself is constitutionally flawed. As indicated, section 2506.01 permits an appeal of a "'final order, adjudication, or decision' . . . but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision *that is issued preliminary to or as a result of a criminal proceeding.*" Ohio Rev.Code Ann. § 2506.01 (emphasis added).

However, since many, if not most of the license nonrenewal or revocation proceedings regarding the adult cabarets are likely to involve situations "preliminary to or as a result of a criminal proceeding" – by way of examples, violation of criminal laws concerning prostitution, inappropriate touching or display of genitals, etc. – the temporary license procedure is essentially rendered a nullity. In addition, Ohio Revised Code § 2506.01.02 allows the officer or body from which the appeal is taken up to forty days to file "a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the final order, adjudication, or decision appealed from."

Furthermore, there is the overriding problem that the procedures provided in Chapter 2506 have been declared to be constitutionally inadequate in guaranteeing prompt judicial review. As noted by the district court in *J.L. Spoons v. City of Brunswick*, 18 F.Supp.2d 775, 779 (N.D.Ohio 1998):

> Three federal courts, including this Court, in the Northern District of Ohio have ruled that the procedures provided for in Chapter 2506 do not provide a constitutionally adequate avenue of prompt judicial review with respect to a locality's decision to restrain protected expressive activity. . . . Plainly speaking, the process a denied applicant must go through before receiving a judicial decision on the merits simply takes too long. For example, § 2506.02 allows the officer or body from which the appeal is taken up to forty days to file a transcript of "all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the final order, adjudication, or decision appealed from." Furthermore, Chapter 2506 does not require a court to rule on the merits of

> an appeal within a specified period of time; rather, the appeal proceeds as any other civil action proceeds.

Thus, in *J.L. Spoons,* the district court concluded that the Brunswick Ordinance licensing scheme was unconstitutional because it "simply does not provide for an effective limit on the time within which the licensor's decision must be made, nor does it provide an adequate avenue for prompt judicial review." *Id.*

The same is true in the present case. The "prompt judicial review" provision in the Township's resolution does not provide specified time limits or guarantee prompt judicial review with respect to decisions for new or renewal permit applications or the revocation of existing permits. The failure of the resolution to provide a specific time limit for completion of judicial review, or guarantee prompt judicial review thus renders it unconstitutional as against Deja Vu and other such operators engaged in First Amendment protected activity since it cannot assure the requisite procedural safeguards. *See id.*

Apart from the fact that the Township's resolution fails to satisfy both safeguards set forth in *Nightclubs,* there also exists a separate ground for declaring the ordinance unconstitutional. By its own terms, Ohio Revised Code 2506.01 "does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding." Because the Township may seek to revoke or not renew Deja Vu's license to operate as a result of a criminal proceeding, such as one involving illegal conduct by its employees or patrons

occurring on its premises, it follows that Ohio Revised Code 2506.01 is simply not applicable. Thus, Resolution No. 00-22 § (J)(1)'s reference to Chapter 2506 of the Ohio Revised Code cannot show that the resolution provides for prompt judicial determination, as that statute itself is inapplicable when an adult cabaret operator, such as Deja Vu, has its license revoked "preliminary to or as a result of a criminal proceeding." Again, virtually all such license revocations may be determined to be "preliminary to or as a result of a criminal activity." Since Chapter 2506 constitutes an inherent part of the temporary permit provision, and the resolution is fatally flawed without Chapter 2506, the temporary permit procedure is completely eviscerated.

3. The resolution's "prompt judicial review" provision cannot be severed from the rest of its provisions

Although the resolution's "prompt judicial review" provision is unconstitutional on its face and as applied, the question becomes whether it is severable from the remainder of the resolution. Here, the Township's current resolution contains a severability clause, which states: "Should any section or provision of this Resolution be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of the Resolution as a whole, or any part thereof other than the parts so declared to be unconstitutional or invalid." Resolution No. 00-22 § (Q). "Severability of a local ordinance is a question of state law." *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Ohio courts determine whether a provision is severable by asking the following three questions:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
>
> (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?
>
> (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part and to give effect to the former only?

State v. Bickford, 28 N.D. 36, 147 N.W. 407, Syllabus ¶ 19 (1913). By including a severability clause, the township "created a presumption that it did not intend the [resolution's] validity to hinge on any constitutionally infirm provision." *Deja Vu of Nashville, Inc.*, 274 F.3d at 389 (citing *INS v. Chadha*, 462 U.S. 919, 932, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)).

Applying the *Bickford* severability test, we reluctantly conclude that the unconstitutional provision for prompt judicial review in the Township's resolution cannot be severed from the rest of its provisions for the simple reason that it is essential to the enforcement of the entire resolution. As a consequence, the resolution is totally unworkable and inapplicable with respect to most of the license renewal or revocation proceedings which are likely to arise under the resolution. Because there is no guarantee of prompt judicial review under the Township's resolution, it thereby follows that the entire resolution must be invalidated since any enforcement of the ordinance would result in a prior restraint of expressive activity in violation of the First Amendment. Consequently, we must conclude that the district court erred in denying Deja Vu's request

to preliminarily enjoin the entire resolution. We address the remaining issues decided by the district court and before us on appeal in the event the Township wishes to amend the resolution to satisfy the constitutional requirements of the First Amendment.

B. The resolution's "hours-of-operation" provision violates the First Amendment and the Equal Protection Clause

In denying Deja Vu's motion for a preliminary injunction, the district court found that the resolution's hours-of-operation provision was not unconstitutional. The resolution generally prohibits adult cabarets from being open for business between midnight and noon. Resolution No. 00-22 § (M)(1). Section (M)(1) of the resolution contains an exception, however, that permits adult cabarets having a license to sell alcoholic beverages to stay open until 2:30 a.m. *Id.* Pursuant to another Township resolution, other "sexually oriented businesses" like adult bookstores or theaters are also allowed to stay open until 2:30 a.m.

Deja Vu argues that the resolution's hours-of-operation provision violates both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Deja Vu points out that as an adult cabaret that does not sell alcoholic beverages, it can operate only between noon and midnight. Specifically, Deja Vu contends that the hours-of-operation provision does not further an important or substantial governmental interest, because there is no evidence that additional operating hours would lead to negative secondary effects. In the alternative, Deja Vu maintains that, even if limiting the hours of operation of adult cabarets does further the township's interest in minimizing negative secondary effects, the restriction on

operating hours is greater than necessary to further that interest. Deja Vu also claims that the resolution violates the Equal Protection Clause because it applies to the hours of operation of sexually oriented businesses that offer live entertainment but not to those that offer only pictorial representations.

In rejecting Deja Vu's claim, the district court applied the four-part test outlined in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *O'Brien* requires a court to determine whether the government enacted a law "(1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *Deja Vu of Nashville, Inc.*, 274 F.3d at 393 (internal quotation marks omitted). After determining that limiting the hours of operation is within the township's constitutional power and that the township's interest in protecting "the public health, safety and welfare" is unrelated to the suppression of free speech, the district court's analysis focused on (1) whether the provision actually furthers that governmental interest, and (2) whether the burden imposed by the provision is greater than necessary to accomplish its goal. Based on its review of two studies that the township relied on concerning the secondary effects of adult cabarets, the district court concluded that the hours-of-operation provision "furthers an important or substantial interest in the protection of public safety." The district court then decided that the hours-of-operation provision "is reasonable and no more repressive of protected speech than is essential to serve Defendants' legitimate interests." In reaching this

conclusion, the district court, citing *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570 (6th Cir.2002), found that "such restrictions on hours have been upheld in the past as reasonable regulations in [the] service of legitimate governmental interests in health and safety," and that the provision "leaves available 'alternative avenues of communication.'" (J.A. at 39.) The district court also emphasized that Deja Vu is still allowed to operate for eighty-four hours per week.

In this regard, we believe that the district court erred in denying Deja Vu's request for a preliminary injunction as to the resolution's hours-of-operation provision. The hours-of-operation provision violates the First Amendment because the restriction is greater than necessary to further the Township's legitimate interests under the fourth prong of the *O'Brien* test. Although the Township claims that the provision is an attempt to close adult cabarets before the bars and taverns in the area close to avoid unruly and intoxicated men from entering during the late night hours, it fails to explain the disparate treatment accorded adult cabarets that have liquor licenses and those that do not. Because both state law and the resolution allow adult cabarets that serve alcohol to stay open until 2:30 a.m., there is no justification why the resolution's greater limitation on the hours of operation of other adult cabarets is necessary to further the Township's interest in minimizing the secondary effects of sexually oriented businesses. As Deja Vu has pointed out, numerous courts have concluded that sexually oriented businesses that serve alcohol actually present an *increased* risk of adverse secondary effects. *See, e.g., N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) ("Common sense indicates that any form of nudity coupled

with alcohol in a public place begets undesirable behavior."). The more restrictive limitation on the hours of operation of adult cabarets that do not serve alcohol is thus unwarranted.

In addition, the hours-of-operation provision also violates the Equal Protection Clause of the Fourteenth Amendment. Deja Vu correctly argues that the Township seeks to regulate and possibly prevent operators of adult cabarets which do not serve liquor from engaging in constitutionally protected conduct during certain times, midnight to 2:30 a.m., while arbitrarily excluding operators of adult cabarets which serve liquor from this hours-of-operation restriction. Such a difference in classification and application of the resolution is irrational, and thus unconstitutional under the Equal Protection Clause, because it fails to advance the Township's legitimate interests in minimizing the adverse secondary effects of sexually oriented businesses. *See City of Cleburne, Tx. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-48, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). We note, however, that the hours-of-operation provision is severable under the *Bickford* severability test.

C. There is a substantial likelihood that the resolution's "health and safety inspection" provision violates the Fourth Amendment

On the other hand, we agree with the district court's ruling that Deja Vu was likely to establish that the health and safety inspection provisions contained in §§ (L)(1) and (M)(2) of Resolution No. 99-15 violated the Fourth Amendment. Specifically, the district court therefore concluded that the inspection provisions did not satisfy the first requirement of the *O'Brien* test because the "Plaintiff

is quite likely to establish that the inspection provisions . . . are outside the constitutional authority of the Union Township Board of Trustees to enact because they purport to authorize searches in violation of the Fourth Amendment."

Resolution No. 99-15 § (L)(1) provided that "Township personnel or agents may at all reasonable times inspect premises to insure continued compliance with the laws of Ohio and these regulations." Section (M)(2) stated that "[t]he owner, operator, or person in charge of the adult cabaret shall allow state or local authorities, including law enforcement officers, access to any and all parts of the premises for the purpose of making any health or safety inspection pursuant to these regulations, and shall cooperate in any background investigation." As amended, the resolution no longer contains these health and safety inspection provisions.

The Ohio Attorney General, however, has filed a cross-appeal, asking us to reverse the district court's decision on this issue. Although the Township has not explicitly announced its intention to reenact the challenged provisions if we were to reverse the district court's decision on this issue, the fact that the Attorney General has filed a cross-appeal infers that it would. This means that the inspection issue is not moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir.1997). Moreover, Deja Vu appears to concede that this issue is not moot.

The Attorney General claims that the Township is entitled to a presumption that it would perform the inspections in a reasonable manner, i.e., constitutionally,

for purposes of the First and Fourth Amendments. In support of this argument, the Attorney General points out that facial challenges based upon the Fourth Amendment are generally disfavored. *Bayside Enters., Inc. v. Carson*, 450 F.Supp. 696, 710 (M.D.Fla.1978) ("Fourth [A]mendment questions are peculiarly suited for adjudication in concrete factual circumstances."); *Gora v. City of Ferndale*, 456 Mich. 704, 576 N.W.2d 141, 150 (1998) ("Because there are circumstances under which the ordinance would be valid, namely, inspections conducted in a reasonable manner consistent with plaintiffs' Fourth Amendment rights, the test is met and the facial challenge to constitutionality fails.").

Deja Vu's facial challenge, however, as the district court properly concluded, is based upon its claim that the inspection provisions violate the First Amendment. The provisions in question grant broad powers to township officials as to when and by whom the inspections will be carried out. Section (L)(1) states that the inspections can be conducted "at all reasonable times." We believe that the inclusion of the word "reasonable" by itself is too vague to save this provision. Section (M)(2) grants township officials, including "law enforcement officers," "access to any an all parts of the premises for the purposes of making any health or safety inspection." Most importantly, the inspection provisions allow for these searches to take place without a warrant, thus creating the prospect of "'unfettered discretion, coupled with the power of prior restraint [that] intimidates parties into censoring their own speech.'" *J.L. Spoons*, 49 F.Supp.2d at 1040 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)).

In response, the Attorney General contends that the Township may validly perform warrantless inspections of adult cabarets because cabarets are pervasively regulated businesses. This contention is based upon *New York v. Burger*, 482 U.S. 691, 709, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), where the Supreme Court held that the general requirement that the government must obtain a warrant prior to conducting a search does not apply to businesses that are pervasively regulated. The question thus becomes whether an adult cabaret is a "pervasively regulated business." *United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 32 I Ed.2d 87 (1972) (holding that when a person engages in a "pervasively regulated business . . . he does so with the knowledge that his business . . . will be subject to effective inspection.").

In *J.L. Spoons, Inc.*, the district court concluded that "sexually oriented businesses do not qualify as highly regulated industries." 49 F.Supp.2d at 1040. Its holding was based primarily on the fact that the Supreme Court has never reached such a conclusion. *Id.* (citing *Burger*, 482 U.S. at 700-01, 107 S.Ct. 2636). Furthermore, the court in *J.L. Spoons, Inc.* reasoned that "because sexually oriented businesses enjoy a degree of First Amendment protection, the government probably could not 'closely regulate' them under the *Burger* line of cases without running afoul of the First Amendment." *Id.* We believe that the reasoning of *J.L. Spoons, Inc.* is sound and is equally applicable to the case before us.

In addition, even if we were to assume that adult cabarets are pervasively regulated businesses, the health-and-safety-inspection provisions in Resolution No. 99-15 do not satisfy the criteria for warrantless administrative searches. Warrantless inspections of a pervasively regulated

business violate the Fourth Amendment unless the following three requirements are met: "(1) there is a substantial government interest underlying the regulatory scheme pursuant to which the search is made; (2) the warrantless inspections are necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of certainty and regularity of its application, provides an adequate substitute for the warrant requirement." *Term Auto Sales, Inc. v. City of Cleveland,* No. 94-3088, 1995 WL 308988, at *3 (6th Cir. May 18, 1995) (citing *Donovan v. Dewey,* 452 U.S. 594, 600-03, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981)).

In order to satisfy the third requirement, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger,* 482 U.S. at 703, 107 S.Ct. 2636. As discussed above, neither the scope of the inspections nor the discretion of the inspecting officers is limited by Resolution No. 99-15. The health and safety inspection provisions are thus invalid, because they are not "carefully limited in time, place, and scope." *Id.* (internal quotation marks omitted). We therefore agree with the district court's conclusion that there is a substantial likelihood that the health and safety inspection provisions are unconstitutional, even if we were to assume that adult cabarets are pervasively regulated businesses.

D. The disclosure of personal information provision does not violate the First Amendment

We reject, however, Deja Vu's claim that the resolution violates the First Amendment by requiring an applicant for an adult cabaret license to furnish the Board of Trustees with certain personal information. An applicant must provide his or her "full name, residence address and date of birth," Resolution No. 00-22 § (D)(5)(c), and an "[a]uthorization for an investigation into the background, including any criminal record, of the applicant and any person or entity named in the application. . . ." *Id.* at (D)(5)(g). In addition, "a list of employees" must be filed by a licensee that states "the name, date of birth, and position of each employee." *Id.* at (M)(3). Deja Vu maintains that requiring the disclosure of this information as a prerequisite for being able to engage in First Amendment protected activities is unconstitutional. As amended, we note that the resolution no longer contains these disclosure provisions, and neither the Township nor the Attorney General has appealed the district court's holding on this issue. The amended resolution also omits the provision that required an applicant to disclose the residence address and social security number of each adult cabaret employee. Nevertheless, the resolution still requires a *licensee* to maintain a list of employees with the Clerk, including "the name, date of birth, and position of each employee." Resolution No. 00-22 § (M)(3).

Contrary to Deja Vu's contention, the disclosure provisions satisfy the *O'Brien* test. Although Deja Vu claims that the collection of personal information from an adult cabaret applicant does not further a substantial governmental interest, we held in *Deja Vu of Nashville, Inc.*, 274 F.3d at 393 that an ordinance requiring applicants to "divulge

such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years" furthered Nashville's "substantial governmental interest in eradicating the secondary effects of sexually oriented businesses." Considering that disclosure provisions such as those contained in the resolution further the substantial governmental interest in minimizing the secondary effects of sexually oriented businesses, we decline to accept Deja Vu's argument that the First Amendment is violated.

Deja Vu also maintains that the personal information gathered is not narrowly tailored to achieve the Township's purported interest in promoting the general welfare, health, and safety of its citizens. In support of this argument, Deja Vu cites *Schultz v. City of Cumberland,* 228 F.3d 831, 852 (7th Cir.2000), in which the Seventh Circuit invalidated a provision requiring an applicant to disclose his or her residential address, concluding that such information "is not narrowly tailored to the government's interest in the time, place, or manner of adult entertainment." Deja Vu also claims that the collection of personal information creates a substantial danger because, pursuant to Ohio's Public Records Act, Ohio Revised Code § 149.43(A)(1) and (B), such disclosures would be considered to be public records. Given that public records can be reviewed by anyone, Deja Vu contends that the personal safety of individuals affiliated with an adult cabaret might be jeopardized.

Although we are cognizant of the tension between the legitimate governmental need for such information and the reasonable concerns of adult cabaret employees for their personal safety, we note that in *Deja Vu of Nashville,*

Inc., 274 F.3d at 394, we upheld the Nashville ordinance's required disclosures, but only after concluding that *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir.1998), prohibits public release of the applicants' names and current and past residential addresses. 274 F.3d at 394. Like the plaintiffs in *Deja Vu of Nashville, Inc.*, Plaintiffs here have presented "significant evidence that the requirement that applicants submit their names and . . . addresses to a public forum poses serious risks to their personal security." *Id.* We therefore conclude that the resolution's disclosure provisions are constitutional, but that the names and residential addresses that are gathered pursuant to those provisions constitute protected private information, and are thus exempted from Ohio's Public Records Act. *See id.* at 395 (holding that "all sexually oriented business license and permit applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act").

E. Deja Vu does not have standing to challenge the resolution's "civil disability" provision

Deja Vu also claims that the civil disability provisions included in the resolution violate the First Amendment because the current resolution states that an application will be denied if "[t]he applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret" has been convicted of or pleaded guilty to (1) a violation of Ohio Revised Code § 503.53(C) within the past five years, or (2) a sex offense covered by Ohio Revised Code § 2907 within the past three years. Resolution No. 00-22 § (F)(2)(e) and (f). Ohio Revised Code

§ 503.53(C) prohibits certain sexual conduct from taking place within an adult cabaret. Besides sexual assaults and prostitution, Ohio Revised Code §§ 2907.02 to 2907.34 also prohibits public indecency, disseminating matter harmful to juveniles, pandering obscenity, and compelling the acceptance of objectionable materials. Because the civil disability provisions implicate the behavior of "[t]he applicant or any person named in the application," Deja Vu claims that the ability to operate an adult cabaret is thus conditioned on the criminal record of not only the applicant, but also on the record of the owners, partners, and employees of the business.

We agree with Defendants that Deja Vu does not have standing to challenge the civil disability provisions because it has not yet applied for a permit and there is no allegation that the person or entity applying for the permit is subject to either of the disability provisions. To have constitutional standing necessary to maintain a lawsuit, "(1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be 'fairly traceable' to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury." *Deja Vu of Nashville, Inc.*, 274 F.3d at 389.

Although Deja Vu claims that it has standing on this issue because Jane Roe II, a female dancer who performs at Deja Vu, was convicted in April of 1997 of a substantially equivalent offense to Ohio Revised Code [§]2907 (obscenity and various sexual offenses), we note that the original resolution was amended so that the employment restrictions now apply only to those individuals who have committed § 2907 sex offenses within the last three years.

Resolution No. 00-22 § (F)(2)(e). Jane Roe II's 1997 conviction is thus insufficient to give Deja Vu standing to challenge the civil disability provisions. For the same reason, neither the 1989 obscenity conviction of John Doe I, who has a two-percent ownership interest in Deja Vu, nor the 1992 obscenity conviction of John Doe II, who is employed by Deja Vu as a disc jockey, is sufficient to establish Article III standing for the adult cabaret.

Moreover, the Township points out that the resolution no longer requires the disclosure of employees in the application or provides for the revocation of a license based upon prior criminal convictions of employees. The original resolution provided that "[a]n application for an initial permit to operate an adult cabaret shall contain . . . [t]he full name, residence address, date of birth, and social security number of each person employed by the adult cabaret. . . ." Resolution No. 99-15 § (D)(5)(f). This requirement was eliminated, however, from the new resolution. Resolution No. 00 22 § (D). Although, as noted above, the resolution still requires a *licensee* to maintain a list of employees with the Clerk, *id.* at § (M)(3), employees are no longer "named in the application for an initial or renewal permit to operate an adult cabaret." *Id.* at § (F)(2)(e) and (f). As a result, the civil disability provisions do not apply to employees. The criminal record of Jane Roe II or any other employee is therefore insufficient to subject Deja Vu to a permit denial or revocation based on the civil disability provisions. Deja Vu has thus not alleged sufficient injury in fact to establish Article III standing on this issue. Further, while Deja Vu also contends that it has standing to challenge the civil disability provisions because "the rapid turnover of entertainers and others in this industry insures that this issue is capable of repetition, yet evading

review," *see Int'l Org. of Masters, Mates, & Pilots v. Brown*, 498 U.S. 466, 473, 111 S.Ct. 880, 112 L.Ed.2d 991 (1991), we note that the resolution no longer requires the disclosure of employees in the application or provides for the revocation of a license based upon prior criminal convictions of employees. Thus, Deja Vu does not have standing to challenge the resolution's civil disability provisions.

F. The resolution's provisions are not unconstitutionally vague

Finally, we reject Deja Vu's argument that several of the resolution's provisions are unconstitutionally vague. Specifically, Deja Vu claims that the resolution does not define the phrases "adequate supervision" in § (M)(4) or "reasonable cause" in § (L) at all, and fails to adequately define the terms "employee" in § (A)(3), "touching" in § (N)(4)(b), or "uncover" in § (N)(4)(c). "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (holding that Rockford's anti-noise ordinance was not unconstitutionally vague). Vague laws are problematic because they: (1) "may trap the innocent by not providing fair warning," (2) fail to "provide explicit standards for those who apply them," and (3) "where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms." *Id.* at 108-09, 92 S.Ct. 2294 (alteration in the original) (internal quotation marks and footnote omitted). A law must therefore "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108, 92 S.Ct. 2294. Deja Vu's vagueness challenge fails because the phrases and terms in question are commonly

used in both legal and common parlance and sufficiently defined so that a reasonable person would understand their meaning. *Id.* at 110, 92 S.Ct. 2294 (explaining that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language").

IV. CONCLUSION

In summary, the Township's resolution is unconstitutional on its face and as applied because it does not provide for prompt judicial review of an adverse licensing decision. As a consequence, we must invalidate the entire resolution inasmuch as it constitutes a prior restraint on freedom of expression as guaranteed under the First Amendment of the United States Constitution. In addition, Deja Vu is entitled to a preliminary injunction as to the resolution's hours-of-operation provision because it violates both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Further, as the district court properly concluded, there was a substantial likelihood that the resolution's health and safety inspection provision violates the Fourth Amendment. However, the district court properly found that the disclosure of information provision does not violate the First Amendment and that the resolution's provisions were not unconstitutionally vague. Finally, Deja Vu does not have standing to contest the civil disability provision of the resolution. For all of the reasons set forth above, we **AFFIRM** in part and **REVERSE** in part the district court's order granting a preliminary injunction, and **REMAND** the case for further proceedings consistent with this opinion.

GILMAN, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's conclusions regarding the Union Township resolution's health-and-safety, disclosure-of-personal-information, and (with one exception) hours-of-operation provisions. The majority is also correct, I believe, in deciding that Deja Vu lacks standing to challenge the civil-disability provision and in rejecting the contention that the resolution is unconstitutionally vague. But I disagree that the resolution constitutes an impermissible prior restraint on expressive conduct protected by the First Amendment. In my view, the Township's automatic issuance of a temporary license satisfies the requirements of the First Amendment as set forth in the binding precedent of *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884 (6th Cir.2000). I therefore respectfully dissent from the majority's conclusion to the contrary.

As a prior restraint on expressive conduct, the resolution must satisfy certain procedural requirements to be constitutional: "(1) the decision whether to issue a license must be made within a specified brief period, and the status quo must be maintained during that period and during judicial review, and (2) there must be a 'guarantee of prompt judicial review.'" *Id.* at 890. The majority concludes that the resolution fails to meet the above criteria because there is "no specific requirement that the status quo be maintained during a specified brief period, no time limits, and no guarantee of prompt judicial review." (Maj. Op. at 800)

This conclusion, I believe, is contrary to our decision in *Nightclubs, Inc.,* where the court explained:

> We recognize that, as a practical matter, the requirement of prompt judicial review means that a city seeking to impose a licensing scheme must take certain steps to avoid constitutional infirmities. Specifically, a city may very well go beyond merely maintaining the status quo and actually permit the communication of protected expression until a judicial decision is rendered on the matter. For example, an ordinance could provide that a license shall issue if a reviewing court fails to reach a decision within a reasonably brief period of time. Similarly, a city could also issue provisional licenses to those businesses and employees who choose to seek judicial review of license denials. As discussed previously, the Paducah ordinance fails to even maintain the status quo, let alone consider the practicalities involved with the necessity of prompt judicial review.

Nightclubs, Inc., 202 F.3d at 894 (citation omitted). As the court noted, "[a] 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." *Id.* at 889. If a resolution provides for a temporary permit, it allows the applicant to engage in the expression at issue. The "heavy presumption against [the ordinance's] validity" thus disappears because the "two evils" associated with prior restraints – "(1) the risk of censorship associated with the vesting of unbridled discretion in government officials; and (2) the risk of indefinitely suppressing permissible speech" – are avoided by the issuance of a temporary permit. *Id.* (internal quotation marks omitted).

Unlike the ordinance at issue in *Nightclubs, Inc.*, the Township resolution under consideration in this case provides for the issuance of a provisional license pending judicial review. Resolution No. 00-22 § (J)(1) ("Pending the outcome of the appeal, the applicant, upon written request filed with the Clerk, shall be issued a temporary permit

(without charge). The temporary permit will allow the operation of the Adult Cabaret until such time as the appeal process as set forth in Chapter 2506 of the Ohio Revised Code has been completed.").

An applicant operating under a temporary permit is required "to follow all other guidelines set forth in the resolution." *Id.* The resolution therefore in effect provides for the maintenance of the status quo pending a final judicial determination, even though it does not use the precise words "status quo." *Nightclubs, Inc.*, 202 F.3d at 890.

Three additional reasons are articulated by the majority in support of its conclusion that § (J)(1) of the resolution is inadequate to ensure prompt judicial review. First, the majority expresses concern that the possibility of operating pursuant to a temporary license while awaiting a decision might chill protected expression. (Maj. Op. at 800) But it cites no authority to support this position, nor am I aware of any. "[A] threat of criminal or civil sanctions after publication 'chills' speech" according to Supreme Court cases such as *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), not the possibility that a court might invalidate the temporary permit. Indeed, the very nature of judicial review ensures the sort of "chill" feared by the majority, because the potential for continuing uncertainty is always present as a case winds its way through the court system. Finding the Township's resolution unconstitutional on this basis, in my opinion, constitutes an unwarranted extension of the Supreme Court's jurisprudence in this area.

Second, the majority notes "the overriding problem that the procedures provided in Chapter 2506 have been

declared to be constitutionally inadequate in guaranteeing prompt judicial review." (Maj. Op. at 800) But the cases that have so declared, such as *J.L. Spoons, Inc. v. City of Brunswick*, 18 F.Supp.2d 775, 779 (N.D.Ohio 1998), upon which the majority relies, are easily distinguishable because they did not involve municipal ordinances that provided for the issuance of temporary permits.

Finally, the majority opines that the appeal process contemplated by the resolution is fatally flawed because Ohio Revised Code § 2506.01 does not permit appeals from "any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding." (Maj. Op. at 800) (quoting Ohio Rev.Code § 2506.01). This section, although not a model of clarity, understandably focuses on keeping criminal appeals out of the Ohio Court of Common Pleas. The majority's concern is unjustified, however, because the denial or revocation of a permit by the Union Township Board, even if *predicated* on a criminal act, is not "issued preliminary to or as a result of a criminal proceeding." This is because the Board's authority under the resolution is civil, not criminal.

The majority, in contrast, interprets § 2506.01 broadly to preclude an appeal, for example, from a decision of the Board "to revoke or not renew Deja Vu's license to operate as a result of a criminal proceeding, such as one involving illegal conduct by its employees or patrons occurring on its premises. . . ." (Maj. Op. at 802) I recognize that this interpretation is not implausible. But the Supreme Court instructs us that "every reasonable construction must be resorted to, in order to save a [legislative act] from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895). Thus, "if an otherwise acceptable construction of a statute would raise serious

constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (citation and internal quotation marks omitted). This case presents such a situation. Absent any interpretation of § 2506.01 by the Ohio courts to the contrary, I believe that we ought to interpret the statute in a manner that saves its constitutionality – that is, by concluding that the statute permits an appeal from an administrative decision by the Board whether or not it is predicated upon a criminal act.

In sum, the Township has taken precisely the steps suggested by this court in *Nightclubs, Inc.* to avoid constitutional infirmities. The concept that the issuance of a temporary license is an acceptable means of providing for prompt judicial review was reaffirmed by this court in *Currence v. City of Cincinnati*, 28 Fed.Appx. 438, 445-46 (6th Cir.2002) ("The licensing scheme also provides for prompt judicial review. . . . [I]t issues a license pending judgment by a court."). There is no reason why the same result should not obtain here. In concentrating on the "trees" of maintaining the status quo and assuring prompt judicial review, I fear that the majority has failed to see that the temporary-permit "forest" more than adequately alleviates the constitutional concern that the resolution constitutes a prior restraint on First Amendment rights. I therefore respectfully dissent from the majority's holding that the prompt-judicial-review provision is inadequate and renders the entire resolution unconstitutional.

In addition, I believe that the majority has gone too far in its treatment of the hours-of-operation provision. While I agree that this provision violates the First

Amendment, I do not agree that the provision offends the Equal Protection Clause.

Section (M)(1) of the resolution generally prohibits adult cabarets from being open for business between midnight and noon, but it permits adult cabarets that have licenses to sell alcoholic beverages to stay open until 2:30 a.m. Because possession of a liquor license is not a suspect classification, § (M)(1) violates the Equal Protection Clause only if it fails "rational-basis" scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. . . .") (citation omitted).

The majority recognizes that § (M)(1) seeks to further a legitimate government interest. (Maj. Op. at 803-804) This recognition should end the inquiry under the Equal Protection Clause. Absent invidious discrimination, a government may further its legitimate interests incrementally. *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("Or the reform may take one step at a time. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others.").

Allowing adult cabarets that have liquor licenses to stay open later than those that do not is admittedly puzzling, except for the point that the Township is bound by state law on the closure time of cabarets that serve alcohol, while it is not so bound for those that do not. The

Township's apparent desire not to "make a bad thing worse" hardly constitutes invidious discrimination. I thus find no support for the majority's conclusion that the hours-of-operation provision violates the Equal Protection Clause. *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 579 (6th Cir.) (noting that "an exemption will rarely, if ever, invalidate a statute, unless the distinction created by the exemption is the result of invidious discrimination," and therefore upholding against an equal-protection challenge a state law that permitted certain adult businesses to stay open later than others), *cert. denied*, 537 U.S. 823, 123 S.Ct. 109, 154 L.Ed.2d 33 (2002). Accordingly, I concur in the majority's decision that § (M)(1) unconstitutionally infringes upon First Amendment rights, but I do not join its conclusion that the provision violates the Equal Protection Clause.

For all of the reasons set forth above, I would affirm the portion of the district court's judgment that upholds the constitutionality of the resolution against Deja Vu's challenge that the resolution operates as a prior restraint on the cabaret's First Amendment rights.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Deja Vu of Cincinnati, L.L.C.,	)	
Plaintiff,	)	
vs.	)	Case No. C-1-99-726
The Union Township Board of Trustees, *et al.*,	)	
Defendants.	)	

Order

(Filed Mar. 14, 2000)

On September 17, 1999, Plaintiff filed a motion for a preliminary injunction in this matter. Subsequently, the parties jointly moved the Court for a continuance in the consideration of Plaintiff's motion. They informed the Court that the United States Supreme Court had heard oral argument in a case involving similar issues and that the outcome of that case would likely impact the disposition of this action. The Supreme Court has not issued a decision in the case before it.

Plaintiff's motion for a preliminary injunction (Doc. 3) is hereby **DENIED**, subject to renewal after the United States Supreme Court issues its decision. Plaintiff may renew its motion by filing a modified version of that motion that includes reference to the Supreme Court's new decision or by filing a notice of reinstatement of the previously filed motion.

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Jude

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Deja Vu of Cincinnati, L.L.C.,	)	
Plaintiff,	)	Case No. C-1-99-726
vs.	)	
The Union Township Board of Trustees, *et al.*,	)	
Defendants.	)	

Memorandum and Order and Preliminary Injunction

(Filed Sep. 28, 2000)

Plaintiff, which operates a nude cabaret in Clermont County's Union Township, initiated this lawsuit against the Union Township Board of Trustees, the Township's Police Department, and Kenneth Geis, the Township Administrator, on September 9, 1999. Simultaneous with the filing of the complaint, Plaintiff filed a motion for a preliminary injunction against the enforcement and implementation of Union Township Resolution No. 99-15, which governs adult cabarets. Pursuant to an agreement of the parties, the Court stayed consideration of Plaintiff's motion for a preliminary injunction pending a decision by the United States Supreme Court in *Erie v. P.A.P.'s A.M.*, ___ U.S. ___, 120 S.Ct. 1382 (2000). This matter is now before the Court upon Plaintiff's renewed motion for preliminary injunction (Doc. 17).

1. Background

Plaintiff began operating Deja Vu, a nude cabaret, in April 1999. The Board of Trustees of Union Township

enacted Resolution No. 99-15 on August 10, 1999. Defendants have agreed not to enforce the Resolution against Plaintiff before this Court has considered Plaintiff's motion for a preliminary injunction.

Plaintiff has not applied for a permit to operate its nude cabaret. Plaintiff challenges the Resolution, nevertheless, on a number of constitutional and federal legal grounds. Plaintiff's specific challenges to the enforcement and implementation of the resolution are as follows: (1) the application necessary to obtain an adult cabaret permit violates the First and Fourteenth Amendments to the United States Constitution and the related right to privacy and anonymity; (2) the application requires that all persons employed by or associated with the entity applying for the adult cabaret permit submit to criminal and background investigations without specifying the purpose for or use of such investigations; (3) the regulations permit governmental officials to deny a permit and prohibit future First Amendment activity on the basis of prior crimes and misconduct; (4) the regulations relating to where adult cabarets may locate conflict with state law regarding the continuation of nonconforming uses and constitutes an unlawful taking of property in violation of the United States and Ohio constitutions; (5) the regulations impose hours of operation that are not reasonably related to any substantial governmental purpose and violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (6) the Resolution fails to provide any guidelines for searches of the premises and individuals' backgrounds and thereby establishes a system of continuing general and warrantless searches in violation of the Fourth Amendment prohibition against unreasonable searches and seizures;

and (7) neither the Resolution nor the enabling statute, Ohio Revised Code ("O.R.C.") ch. 2506, provides the requisite prompt judicial review. The Court has permitted the State of Ohio to intervene for the purpose of defending the enabling statute.

2. The Preliminary Injunction Standard

A motion for preliminary injunction invokes the district court's authority, at an early stage in the proceedings, to determine whether equitable relief is warranted pending resolution of the plaintiff's claims on their merits. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Corbin v. Texaco, Inc.*, 690 F.2d 104, 105 (6th Cir. 1982). The four factors to be balanced when determining whether a preliminary injunction may issue are

(1) the likelihood of the plaintiff's success on the merits;

(2) whether the injunction will save the plaintiff from irreparable injury;

(3) whether the injunction would harm others; and

(4) whether the public interest would be served by the injunction.

See Forry v. Neundorfer, Inc., 837 F.2d 259, 262 (6th Cir. 1988); *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985). These four factors are to be weighed in a balance; they do not constitute absolute prerequisites. *See Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1348 (6th Cir. 1993); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). In general, the degree of likelihood of success on the merits that must

be shown is inversely proportional to the degree of irreparable injury the plaintiff will suffer absent an injunction. *See Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission*, 812 F.2d 288, 290 (6th Cir. 1987).

3. Analysis

A. Standing

The federal courts recognize a "general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). Exceptions to that general rule permit facial challenges to statutes on First Amendment grounds in certain limited situations. *See id. See also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223-24 (1990). Those limited situations include challenges "in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." *FW/PBS, Inc.*, 493 U.S. at 224.

Plaintiff argues that its challenge to Resolution No. 99-15 is based upon the unbridled discretion exception to the general rule prohibiting facial challenges to statutes. It does not explain, however, how that exception permits it to challenge the Resolution on Fourth and Fourteenth Amendment grounds outside the context of an actual application of the Resolution to Plaintiff. Having failed to do so, Plaintiff has not demonstrated, to this Court's satisfaction, that it has standing to challenge Resolution No. 99-15 on constitutional or legal grounds other than the First Amendment. It has not, accordingly, established that it is likely to succeed on the merits of its claims that are

not based upon the First Amendment. The Court, having concluded that Plaintiff is very unlikely to succeed on the merits of those claims by virtue of its lack of standing to assert them, further concludes that Plaintiff has not demonstrated that the other relevant factors favor the issuance of an injunction so strongly that their combined weight mandates the issuance of the injunction.

As regards the First Amendment claims, Plaintiff contends that a facial challenge to Resolution No. 99-15 is permissible on the ground that the Resolution vests unbridled discretion in the decisionmaker. In this instance the decisionmaker is the Union Township Board of Trustees. The Resolution provides as follows regarding the discretion of the Board of Trustees:

> (E) Inspection and investigation
>
> Upon receipt of an application for a permit or renewal permit to operate an adult cabaret, the Clerk shall refer the applicant to the township police department to be fingerprinted, and shall notify the Chief of such department to conduct an investigation into the background of the applicant and, in the case of a permit, into the background of other persons or entities named in the application. A written report of the results of the investigation shall be prepared by the investigating officer or agency and filed with the Clerk and shall become part of the application for a permit. The failure of the Board of Trustees to receive the reports shall not be cause for an application to be incomplete or for the denial of a permit and shall affect the time for making a decision upon an application as set forth in Section F(1).
>
> (F) Action on Application for Permit & Renewal Permit

(1) The Board shall hear any application for a permit or renewal permit, at a public hearing, during a regular meeting or during a special hearing and shall act, [sic] upon such application for permit within thirty days after receiving the application as described in section (D). The applicant shall have the opportunity to present information, evidence and testimony to the Board, at a public hearing regarding the application.

(2) The Board shall approve the application unless:

(a) The application is incomplete, contains any false information, or fails to comply with these regulations;

(b) The applicant is a limited partnership, corporation, or other entity that is not in good standing in the jurisdiction where organized or is not authorized to do business in Ohio;

(c) The operation of an adult cabaret at the specified premises would violate the existing zoning resolution;

(d) The applicant or any person named in the application for a permit or renewal permit to operate an adult cabaret is under age eighteen;

(e) The applicant or any person named in an application for an initial or renewal permit to operate an adult cabaret within the past five years has been convicted of or pleaded guilty to an offense under Ohio Revised Code Chapter 2907 or a substantially equivalent offense under a municipal ordinance in Ohio, or under the laws of another state or territory or of the United

States, or under a municipal ordinance in any such jurisdiction;

(f) The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret or any person employed in the adult cabaret, has been convicted of or pleaded guilty to a violation of Ohio Revised Code section 503.53(C); or

(g) The applicant has violated these regulations.

(3) If the application is denied, the Clerk shall promptly notify (within five calendar days) the applicant in writing of the order denying the application. If the Board approves the application, the Clerk shall promptly issue the applicant a permit (within five calendar days).

(4) A permit or renewal permit to operate an adult cabaret shall contain the address of the permit premises, the name and address of the permit holder, and the date of issuance and date of expiration of the permit.

In *FW/PBS, Inc., supra,* the Supreme Court addressed facial challenges under the First Amendment to licensing statutes. The Court identified a statute that vests unbridled discretion in the licensing decisionmaker as one that may be subject to facial challenge. *See id.* at 223. The Court further noted that "failure to place limitations on the time within which a . . . decisionmaker must make a determination . . . is a species of unbridled discretion." *Id.* (quoting *Freedman v. Maryland,* 380 U.S. 51, 56-57 (1965)). The Court held that a facial challenge under the First Amendment would be permitted where a scheme creates a risk of delay in which case every application of

the statute creates an impermissible risk of the suppression of ideas. *Id.* at 224 (citing *Taxpayers for Vincent*, 466 U.S. at 798 n.15; *Freedman*, 380 U.S. at 55).

In this case, the above-quoted portions of Resolution No. 99-15 do not vest unbridled discretion in the Board of Trustees. Quite to the contrary, the Resolution requires the Board of Trustees to grant a permit in all but certain clearly delineated circumstances. Plaintiff argues, nevertheless, that its facial challenge to the Resolution is permissible.

Plaintiff observes that subsection (F) of the Resolution requires the Board of Trustees to act upon an application for a permit within thirty days of its filing. Subsection (E) of the Resolution requires the Union Township Police Department to conduct an investigation after an application is filed and to make a report to the Board of Trustees. Subsection (E) provides as follows regarding the effects of the failure of the Board of Trustees to receive the Police Department's report prior to the expiration of the thirty day period: "The failure of the Board of Trustees to receive the reports shall not be cause for an application to be incomplete or for the denial of a permit and shall affect the time for making a decision upon an application as set forth in Section F(1)."

A fair reading of the language concerning the effects of a delay is that the Board of Trustees may not deny an application as incomplete pursuant to subsection (F)(1) of the Resolution on the ground that the Board of Trustees has not received the Police Department's report. The delay in receiving that report may, however, result in a delay in any decision on the application pending completion of the investigation.

The Resolution does not, therefore, include a firm limitation upon the amount of time within which the Township must determine whether a permit will issue. It lacks, specifically, any requirement that the Union Township Police Department complete its investigation within a limited period of time. Accordingly, to the extent that the Board of Trustees' consideration of the application for a permit is dependent upon the completion of that investigation, the Resolution includes no absolute time limitation. The consideration of an application may continue indefinitely, creating the circumstance, identified by the Supreme Court, in which a facial challenge to the Resolution may be permitted under the First Amendment. *See FW/PBS, Inc.*, 493 U.S. at 224. The Court concludes, on that basis, that Plaintiff may raise a facial challenge to Resolution No. 99-15 on First Amendment grounds without having filed an application for a permit under the Resolution. Its challenges to the Resolution that are not based on the First Amendment are not permitted, as the Court has stated.

B. Likelihood of Success on the Merits

The parties devote nearly all of their energies to the likelihood of success on the merits factor set forth in *Forry, supra*. Both sides apparently believe that the Court's determination on that factor will be dispositive of Plaintiff's motion. The Court's analysis begins with that factor.

Underlying a number of Plaintiff's claims is an allegation that the application of Resolution No. 99-15 to Plaintiff would deprive Plaintiff or its employees, owners, and/or patrons of rights guaranteed by the First Amendment. Nude dancing is a form of expression entitled to

protection under the First Amendment. *See Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981). Not all nude dancing qualifies for that protection, however, and the analysis with regard to particular forms of nude dancing is appropriately made only on a case-by-case basis. *See DLS, Inc. v. Chattanooga*, 107 F.3d 403, 408-09 (6th Cir. 1997)[1]. Plaintiff raises the following challenges to Resolution No. 99-15 under the First Amendment: (1) the Resolution impermissibly uses prior crimes and misconduct to preclude the exercise of First Amendment rights; (2) the Resolution's inspection provisions violate the First Amendment; (3) the Resolution's provisions related to hours of operation are unrelated to attempts to regulate the secondary effects of adult oriented businesses, in violation of the First Amendment; and (4) the Resolution's disclosure provisions violate the First Amendment. The Court considers each of those challenges in order to determine whether Plaintiff has demonstrated a likelihood of success on the merits of its claim under the First Amendment.

i. the disqualification and hours of operation provisions

Plaintiff's first First Amendment challenge to the statute is based upon Resolution No. 99-15's subsections (F)(2)(e) and (f), which provide that an application for a

[1] Because Plaintiff's challenge to Resolution No. 99-15 is a facial challenge, Plaintiff need not establish that the nude dancing at Deja Vu is expressive conduct protected by the First Amendment. Resolution No. 99-15's definition of "nudity" is inarguably sufficiently broad to encompass expressive forms of nude dancing.

permit to operate an adult cabaret may be denied in the following instances:

> (e) The applicant or any person named in an application for an initial or renewal permit to operate an adult cabaret within the past five years has been convicted of or pleaded guilty to an offense under Ohio Revised Code Chapter 2907 or a substantially equivalent offense under a municipal ordinance in Ohio, or under the laws of another state or territory or of the United States, or under a municipal ordinance in any such jurisdiction;
>
> (f) The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret or any person employed in the adult cabaret, has been convicted of or pleaded guilty to a violation of Ohio Revised Code section 503.53(C).

Chapter 2907 of the Ohio revised Code prohibits, *inter alia*, pandering obscenity and other obscenity-related offenses. Section 503.53(C) prohibits employees of adult cabarets from touching other individuals on certain specified parts of their bodies and from uncovering those body parts.

Plaintiff notes that the Resolution provides for the denial of an application in the event that anyone named in an application, including an employee or a shareholder, in the case of a corporate applicant, has committed an offense prohibited by chapter 2907 within the five years preceding the application. The Resolution further provides for the denial of an application in the event that any person listed in the application has ever violated O.R.C. §503.53(C).

Plaintiff contends that the resolution is impermissible as a prior restraint on speech inasmuch as it conditions the granting of a permit to operate a nude cabaret, and thus the right of the proprietor and the employees of the cabaret to engage in conduct that is protected by the First Amendment, upon the past conduct of everyone listed in the application for the permit. Defendants do not deny that a permit may, consistently with the Resolution, be denied solely on the basis of past conduct in violation of state law by anyone listed on an application for a permit. They also tacitly concede that the denial of a permit prevents the applicant and its employees from engaging in certain conduct, erotic nude dancing and the sponsorship of erotic nude dancing, that is protected by the First Amendment. Defendants argue, nevertheless, that Resolution No. 99-15 is not an impermissible prior restraint on speech.

In *DLS, Inc., supra,* the Court of Appeals clarified that the test outlined in *United States v. O'Brien,* 391 U.S. 367 (1968), for challenges to content-neutral statutes that impinge upon First Amendment rights was endorsed in the context of nudity statutes by the Supreme Court is *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991). Because Resolution No. 99-15 is content-neutral, in that it applies to nudity regardless of the message expressed by or through the nudity, the *O'Brien* test determines its validity. The *O'Brien* test is as follows:

> a government regulation is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on

> alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. That test also applies to Plaintiff's third challenge to Resolution No. 99-15 based on the First Amendment: that the hours of operation provision of the Resolution, which permits a nude cabaret to operate only until Midnight violates rights of free expression.

Plaintiff has not seriously argued that the enactment of the disqualification and hours of operation provisions of Resolution No. 99-15 was not within the constitutional power of the Union Township Board of Trustees. The Court concludes, at least for purposes of the instant motion, that the first requirement of the *O'Brien* test is satisfied with respect to those provisions. Accordingly, the Court advances to consideration of the other three factors of the *O'Brien* test in regard to Plaintiff's challenges to the disqualification and hours of operation provisions of Resolution No. 99-15 based on the First Amendment.

The stated purpose underlying Resolution No. 99-15 is the protection of "the public health, safety and welfare." That governmental interest is substantial and is unrelated to the suppression of free expression. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Triplett Grille, Inc. v. Akron*, 40 F.3d 129, 135 (6th Cir. 1994). Accordingly, the Resolution satisfies the third requirement of the *O'Brien* test. The second requirement of that test is satisfied, however, only if the Resolution actually furthers the governmental interest.

Plaintiff contends that Defendants have failed to demonstrate that Resolution No. 99-15 actually furthers the stated purpose of protecting the public health, safety,

and welfare. In the Resolution itself, the Union Township Board of Trustees stated as follows concerning the Resolution's effect upon health, safety, and welfare:

> B. The Board of Trustees has relied upon information provided and reviewed by counsel and staff relating to the secondary effects in other cities including: Garden Grove, California; Los Angeles, California; Indianapolis, Indiana; Minneapolis, Minnesota; Cleveland, Ohio; Oklahoma City, Oklahoma; Austin, Texas; Houston, Texas; Tucson, Arizona; Phoenix, Arizona and Seattle, Washington; and
>
> C. From the review of other cities' studies and citizen comments regarding the secondary effects of sexually oriented businesses received during public hearings, there is convincing evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both existing businesses around them and the surrounding residential areas, causing among other secondary effects and nuisance effects, increased crime and diminution of property values.

Plaintiff argues that no evidence supports Defendants' contention that Resolution No. 99-15 actually addresses the public health, safety, and welfare concerns that the Union Township Board of Trustees cited in enacting the Resolution. To the extent that Plaintiff's contention is that the record contains no direct evidence that the operation of nude cabarets outside the hours prescribed by the Resolution has had negative impact upon the health, safety, and welfare of residents of Union Township, Plaintiff is correct. The record does contain evidence of studies of the impact of sexually oriented businesses upon the crime rates in other urban areas, including Minneapolis, Austin, Indianapolis,

Los Angeles, and Garden Grove. Reliance upon such evidence is permissible so long as the enacting authority reasonably believes the evidence to be relevant to the problem that the authority addresses. *See Renton,* 475 U.S. at 51-52.

The Court has reviewed the evidence of studies from other American cities submitted by Defendants in support of Resolution No. 99-15. Most of that evidence relates either to adult oriented businesses generically or to types of adult oriented businesses other than nude cabarets. The Court is not persuaded that reliance upon that evidence alone would be reasonable, given that Resolution No. 99-15 addresses nude cabarets only.

Two of the studies upon which Defendants rely, those from Indianapolis and Austin, address adult cabarets specifically. Those studies showed an increase in the incidence of sex-related crimes and other crimes in areas in which adult cabarets operate. The results of those studies provide a reasonable basis for belief on the part of the Union Township Board of Trustees that the presence of nude cabarets has a negative impact upon the health, safety, and welfare of the residents of the area surrounding the cabarets, particularly in the form of increased rates of sex-related crime.

For purposes of the instant motion only, the Court is persuaded that Plaintiff cannot demonstrate that the second requirement of the *O'Brien* test is *not* satisfied with respect to Resolution No. 99-15. The Court finds, for purposes of the present motion, that the regulation of nude cabarets in Union Township, specifically through the disqualification and hours of operation provisions of Resolution No. 99-15, furthers an important or substantial

governmental interest in the protection of public safety. The Court must, nevertheless, determine whether Plaintiff is likely to succeed in proving that Resolution No. 99-15 fails the fourth requirement of the *O'Brien* test: that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See O'Brien*, 391 U.S. at 377.

Defendants contend that the provisions of Resolution No. 99-15 disqualifying persons with past convictions for sex-related offenses and limiting the hours of operation of adult cabarets have no greater impact on protected activities than is essential to the governmental interest served by the Resolution. With regard to Plaintiff's challenge to the hours-of-operation restriction in the Resolution, the Court is persuaded that the regulation is reasonable and no more repressive of protected speech than is essential to serve Defendants' legitimate interests. In other words, the regulation does not "unduly restrict" erotic expression. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (5th Cir. 1998).

The Court notes that such restrictions on hours have been upheld in the past as reasonable regulations in service of legitimate governmental interests in health and safety. *See Richland Bookmart, supra*. Moreover, the Court is persuaded that the hours limitation included in Resolution No. 99-15 does not unduly restrict expressive conduct because it leaves available "alternative avenues of communication." *Id.*

The Resolution permits Plaintiff and its employees and others in Union Township to deliver the erotic message expressed by totally nude dancing between the hours of Noon and Midnight. *See* Resolution No. 99-15(M)(1). It

does not, therefore, totally foreclose the expression of that erotic message in Union Township. Eighty-four hours per week are available for that form of expression. Moreover, the erotic message, hampered only by the smallest covering of the genital and nipple areas of female dancers and the genital areas of male dancers, may be delivered without reference to Resolution No. 99-15, which, by its own definitional terms does not apply outside the context of performance in a state of nudity.

Justice Souter, in his concurring opinion in *Barnes, supra,* which is controlling authority, at least in this circuit[1], held that the limitation upon free expression imposed by a ban on total nudity where performance in "[p]asties and a G-string" is permitted is "minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Barnes,* 501 U.S. at 587. In other words, the hours restriction of Resolution No. 99-15 permits Plaintiff and its employees to deliver their erotic message using total nudity for twelve hours every day and to deliver the same message with the "minor" limitation of minimal covering for some additional period of time every day. Under those circumstances, the Resolution neither unduly restricts the expression of the erotic message nor deprives Plaintiff and others in Union Township of "alternative avenues of communication." The Court is persuaded, for purposes of the present motion, that the hours restriction satisfies the fourth requirement of the *O'Brien* test.

The same analysis applies to the disqualification provisions that are the subject of Plaintiff's challenge to

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[1] *See DLS, Inc.*, 107 F.3d at 408 n.4.

Resolution No. 99-15 under the First Amendment. The difference between the hours provision and the disqualification provisions is that the former permits totally nude dancing during certain time periods. The latter prohibits totally nude dancing at any time if anyone listed in the application for a permit has been convicted of sex-related crimes during the prescribed time periods. As the Court has noted, however, the requirement that dancers minimally cover their genital and nipple areas is a "minor" restriction on free expression. *See Barnes*, 501 U.S. at 587. It does not unduly restrict the right of persons in Union Township to express an erotic message and leaves available the alternative avenue of expression that was recognized by Justice Souter in *Barnes*. The incidental effect of the Resolution on rights protected by the First Amendment is reasonable in light of the availability of those alternative avenues. Accordingly, the Court is persuaded, for purposes of the instant motion, that the disqualification provisions of Resolution No. 99-15 satisfy the requirements of the *O'Brien* test.

ii. the disclosure provisions

Plaintiff also challenges the following disclosure provisions of Resolution No. 99-15:

(D) Application for Permit

* * *

(5) An application for an initial permit to operate an adult cabaret shall contain the following:

(a) The address where the adult cabaret is operated, or is to be operated, including a legal description of the property,

(b) The status of the applicant as an individual, partnership or limited partnership, domestic or foreign corporation, or other entity,

(c) The full name, residence address, date of birth, and social security number of the applicant or the person applying on behalf of a partnership, corporation, or other entity,

(d) If the applicant is a partnership or limited partnership, the name of the partnership; the status of the partnership as a general or limited partnership; the state or other jurisdiction under which it is organized; the address of its principal office in Ohio; its federal employer identification number; the name and address of its statutory agent in Ohio; the full name, residence address, date of birth, and social security number of each partner; and the status of each partner as a general or limited partner;

(e) If the applicant is a corporation, the name of the corporation; the state or other jurisdiction under which it is organized; the address of its principal office in Ohio; its federal employer identification number; the name and address of its statutory agent in Ohio; and the full name, residence address, date of birth, and social security number of each shareholder holding more than two per cent of the applicant's stock. If any shareholder is a corporation or general or limited partnership, the same information shall be included from such shareholder as is required for an applicant that is a corporation or general or limited partnership;

(f) The full name, residence address, date of birth, and social security number of each person employed by the adult cabaret or whose

> employment is contemplated by the establishment, and the capacity in which such person is or is to be employed;

Because Plaintiff's challenge is a facial challenge to a content-neutral regulation affecting rights protected by the First Amendment, the four-part *O'Brien* test is applied to determine whether the regulation is permissible. *See DLS, Inc.*, 107 F.3d at 408-09.

While Plaintiff argues that the disclosure requirements of Resolution No. 99-15 are unconstitutional, it has not attempted to demonstrate that the enactment of those requirements was outside the constitutional power of the Union Township Board of Trustees. *See O'Brien*, 391 U.S. at 377. Rather, Plaintiff contends that the disclosure provisions of the Resolution do not further the governmental interests underlying the Resolution and that the incidental restriction of the disclosure provisions on First Amendment freedoms is greater than is essential to the furtherance of those governmental interests.

The Court has concluded in the previous section of this Memorandum and Order that the governmental interests underlying Resolution No. 99-15 are important and substantial and unrelated to the suppression of free expression. The Court has also concluded, for purposes of the present motion, that the *disqualification* provisions of the Resolution further those interests. The disclosure provisions of the Resolution are related to the disqualification provisions in that they permit Union Township to identify those persons whose employment by or association with Plaintiff results in the disqualification of Plaintiff as an adult cabaret operator.

The Court's inquiry with regard to the disclosure provisions of Resolution No. 99-15 is, therefore, focused on the fourth requirement of the *O'Brien* test: that the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of the governmental interests underlying the Resolution. *See O'Brien*, 391 U.S. at 377. As the Court has noted, that requirement has been characterized as a reasonableness test. *See Richland Bookmart*, 137 F.3d at 440. The regulation is permissible if it is reasonably designed to serve the legitimate governmental interest and allows for alternative avenues of communication. *See id.*

The Court does not consider the reasonableness of the disclosure requirements of Resolution No. 99-15 in a vacuum. Other courts have addressed similar provisions. In *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 709 (5th Cir. 1994), the Fifth Circuit Court of Appeals clearly explained the chilling effect on rights protected by the First Amendment of disclosure requirements. The court, nevertheless, held that provisions requiring the disclosure of personal information related to employees and owners of certain sexually oriented businesses are "plainly correlated with the side effects that can attend these businesses." *Id.* at 710. The court distinguished regulations enacted to combat the secondary effects of sexually oriented businesses from regulations, like those at issue in *Acorn Investments, Inc. v. Seattle*, 887 F.2d 219 (9th Cir. 1989), and *Genusa v. Peoria*, 619 F.2d 1203 (7th Cir. 1980), which were enacted simply to regulate the clustering of such businesses in certain geographical areas. *See id.* The court concluded that the disclosure of personal information related to employees and owners was "plainly correlated" with the governmental interests

supporting the former, while such disclosure is unrelated to the governmental interests underlying the latter. *See id.*

The Sixth Circuit Court of Appeals also has recognized the relationship between disclosure requirements and the governmental interests served by regulations like Resolution No. 99-15. *See East Brooks Books, Inc. v. Memphis,* 48 F.3d 220, 226 (6th Cir.), *cert. denied,* 516 U.S. 909 (1995). The court stated that the governmental authority "has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business." *Id.* The court concluded, however, that the governmental interest did not support the disclosure of personal information "of every person with any ownership interest, regardless of how small." *Id.*

Applying the existing jurisprudence to the disclosure provisions of Resolution No. 99-15, the Court concludes that Plaintiff is unlikely to succeed in demonstrating that those disclosure requirements, in their entirety, fail to satisfy the fourth requirement of the *O'Brien* test. The Court is persuaded, for purposes of the present motion, that subsections (D)(5)(a), (b), (c), and (f) are sufficiently related to the governmental interests supporting Resolution No. 99-15 and are not impermissibly broad. Those provisions relate only to the sexually oriented business itself, those who will work in or operate the business, and those who have a controlling or significant interest in the operation of the business. *See East Brooks Books,* 48 F.3d at 226. The portion of subsections (D)(5)(d) and (e) ending with the words "statutory agent in Ohio" are equally sufficiently related to the governmental interests supporting the Resolution to survive Plaintiff's facial challenge.

Of the specific disclosure requirements of Resolution No. 99-15, only the portions of subsections (D)(5)(d) and (e) requiring the disclosure of personal information related to every partner in a partnership applicant, shareholder of a corporate applicant, and shareholder of any corporation that is a shareholder of a corporate applicant are impermissibly broad. While those requirements may apply to partners and shareholders who have controlling or significant interests in the operation of sexually oriented businesses, they also apply to minor partners and shareholders who have no such interest. Accordingly, they may be applied in such a manner that they are more restrictive on activities protected by the First Amendment than is essential to serve the legitimate governmental interests underlying Resolution No. 99-15.

iii. the inspection provisions

Plaintiff also challenges Resolution No. 99-15 on the ground that the following inspection provisions violate the First Amendment:

> (L) Inspections, Investigations, and Physical Examinations
>
> (1) Township personnel and agents may at all reasonable times inspect permit premises to insure continued compliance with the laws of Ohio and these regulations.
>
> * * *
>
> (M) Rules Governing Operation of an Adult Cabaret
>
> * * *

> (2) The owner, operator, or person in charge of the adult cabaret shall allow state or local authorities, including law enforcement officers, access to any and all parts of the premises for the purpose of making any health or safety inspection pursuant to these regulations, and shall cooperate in any background investigation.

In its memorandum in support of its motion for a preliminary injunction, Plaintiff argues that the inspection provisions violate the First and Fourth Amendments to the United States Constitution. Plaintiff devotes most of its argument to the Fourth Amendment claim, however, and refers only to the decision in *J.L. Spoons, Inc. v. Brunswick*, 49 F. Supp.2d 1032 (N.D. Ohio 1999), in support of its contention that the inspection provisions violate the First Amendment.

The *J.L. Spoons* court discussed a similar inspection provision in the context of the Fourth Amendment and concluded that it was unconstitutional. That court mentioned the First Amendment but did not analyze the provisions in light of that amendment under the *O'Brien* test. Rather, the court concluded, without explanation, that the constitutionality of the inspection provision "is dubious under the . . . First Amendment." *Id.* at 1041. The *J.L. Spoons* court's analysis is, nevertheless, instructive in the application of the *O'Brien* test to the inspection provisions of Resolution No. 99-15.

As the Court has stated, the first element of the *O'Brien* test requires that the regulation be within the constitutional power of government. The import of the *J.L. Spoons* decision in this matter is that the *J.L. Spoons* court concluded that an inspection provision similar to those in question was not within the constitutional power

of government to enact inasmuch as it violated the Fourth Amendment's prohibition against warrantless searches.

Subsections (L)(1) and (M)(2) of Resolution No. 99-15 purport to authorize warrantless searches. They vest unfettered discretion in township officials to conduct searches, inasmuch as they do not define what would constitute a "reasonable" time to conduct a search and do not require the officials who would conduct the search to convince any neutral authority that cause exists for the search. The Court is persuaded that Plaintiff is quite likely to establish that the inspection provisions of Resolution No. 99-15 are outside the constitutional authority of the Union Township Board of Trustees to enact because they purport to authorize searches in violation of the Fourth Amendment. *See J.L. Spoons,* 49 F. Supp.2d at 1040-41.

Because the inspection provisions do not satisfy the first requirement of the *O'Brien* test, the Court need not consider the other requirements of that test. In short, the Court concludes that Plaintiff is likely to succeed on the merits of its First Amendment claim to the extent that that claim is based upon the inspection provisions of Resolution No. 99-15.

iv. severability

Defendants have argued that a finding that one portion of Resolution No. 99-15 is unconstitutional on its face does not render the Resolution as a whole unenforceable. Defendants note that the Resolution includes the following severability provision:

(Q) Severability

> Should any section or provision of this Resolution be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of the Resolution as a whole, or any part thereof other than the part so declared to be unconstitutional or invalid.

"Severability of a local ordinance is a question of state law." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988). In *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 523-24 (1994), the Ohio Supreme Court reiterated the following test for determining whether an unconstitutional provision may be severed:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
>
> (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken out?
>
> (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

(quoting *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927)).

The inspection provisions of Resolution No. 99-15 may be separated from the rest of the Resolution without rendering the Resolution unable to stand by itself. The inspection provisions are tangential to the primary purpose of the Resolution. The elimination of those provisions does not deprive the Resolution of its ability to serve the governmental interests that support it. The insertion of

words or terms is not necessary in order to separate the constitutional and the unconstitutional parts of the Resolution and to give effect only to the parts that are constitutional. The Court concludes, therefore, that subsections (L)(1) and (M)(2) of the Resolution may be severed from Resolution No. 99-15.

The Court arrives at the same conclusion regarding the portions of the disclosure provisions at subsection (D)(5)(d) and (e) following the words "statutory agent in Ohio." The Resolution stands by itself without those portions of subsection (D)(5)(d) and (e). The requirement that a partnership or corporate applicant disclose personal information regarding certain partners, shareholders, or shareholders of shareholders is not so connected to the general scope of the Resolution as to "make it impossible to give effect to the apparent intention" of the Union Township Board of Trustees if those portions of the Resolution are "stricken out." *Maurer, supra.* Finally, the insertion of words or terms is not necessary in order to separate the constitutional part of the Resolution from the unconstitutional part and to give effect to the former only. The Court concludes, therefore, that the portions of subsection (D)(5)(d) and (e) following the words "statutory agent in Ohio" may be severed from Resolution No. 99-15.

v. conclusion

On the basis of the foregoing, the Court concludes that Plaintiff is substantially likely to succeed on the merits of its claim that subsections (L)(1) and (M)(2) of Resolution No. 99-15 and the portions of subsection (D)(5)(d) and (e) following the words "statutory agent in Ohio" are unenforceable. The Court concludes that Plaintiff is unlikely to

succeed on the merits of its First Amendment claim as it pertains to the other portions of Resolution No. 99-15.

C. Irreparable Injury

The second factor the Court must consider in determining whether a preliminary injunction should issue is whether the injunction will save the plaintiff from irreparable injury. *See Forry*, 837 F.2d at 262. As Plaintiff observes, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 374 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). Defendants have not identified authority to the contrary. The Court is persuaded that Plaintiff will suffer irreparable injury if Defendants are not enjoined from enforcing the unconstitutional provisions of Resolution No. 99-15.

D. Harm to Others

Plaintiff argues, convincingly, that the third factor set forth in *Forry, supra*, favors the issuance of the requested preliminary injunction. Plaintiff contends that the only "harm" resulting from the injunction is Defendants' inability to enforce the unconstitutional provisions of Resolution No. 99-15. As the Court has previously noted, Defendants may enforce the Resolution without the portions that the Court has determined to be unconstitutional for purposes of the present motion. Accordingly, the governmental interests underlying the Resolution will not be undermined by the issuance of an injunction preliminarily enjoining Defendants from enforcing subsections (L)(1) and (M)(2) and the portions of subsection (D)(5)(d)

and (e) following the words "statutory agent in Ohio." The Court agrees that the third *Forry* factor favors issuance of a preliminary injunction.

E. The Public Interest

The final factor set forth by the court in *Forry, supra,* is the public interest in the issuance of the injunction. The public interest is served by an injunction protecting First Amendment rights. Defendants do not argue to the contrary. The Court is persuaded that the issuance of a preliminary injunction in this matter would serve the public interest.

4. Conclusion

For the foregoing reasons, Plaintiff's motion for a preliminary injunction (Doc. 17) is hereby **GRANTED** as follows: Defendants are hereby **ENJOINED** from enforcing or implementing subsections (L)(1) and (M)(2) of Resolution No. 99-15 as well as the portions of subsection (D)(5)(d) and (e) following the words "statutory agent in Ohio" pending final disposition of this matter.

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Deja Vu of Cincinnati, L.L.C., Plaintiff,	)	
vs.	)	
The Union Township Board of Trustees, *et al.*,	)	Case No. C-1-99-726
Defendants.	)	

Memorandum and Order

(Filed Oct. 31, 2000)

On September 28, 2000, this Court issued a Memorandum and Order and Preliminary Injunction in this matter. The Court granted, in part, and denied, in part, Plaintiff's motion for a preliminary injunction against the enforcement and implementation of Union Township Resolution No. 99-15. This matter is now before the Court upon Plaintiff's motion (Doc. 32) to alter or amend the Court's September 28 Memorandum and Order.

Plaintiff brings its motion pursuant to Rule 59 of the Federal Rules of Civil Procedure, which provides a mechanism for the granting of new trials and the amendment of judgments. The Rule does not apply to temporary orders that do not finally resolve the merits of claims or result in judgments. Accordingly, Plaintiff's motion is not properly asserted pursuant to Rule 59 and is **DENIED** for that reason.

The motion is also **DENIED** because it rests upon a fallacious argument. Plaintiff notes that the Court did not

explicitly address its contention that Resolution No. 99-15 fails to provide constitutionally adequate judicial review. As counsel for the State of Ohio has ably demonstrated, however, Ohio Revised Code §503.57 provides for appeal of a denial or revocation by the Board of Trustees of a permit to operate an adult cabaret. That provision satisfies the requirements of the Constitution. *See Harris v. Fitchville Twp. Trustees*, 99 F. Supp.2d 837, 844 (N.D. Ohio 2000) (identical ordinance not constitutionally defective because review under Ohio Revised Code §503.57 and chapter 2506 is available). For those reasons, Plaintiff's motion to alter or amend (Doc. 32) is **DENIED.**

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

Ohio Revised Code

§ 503.51 Definitions

As used in sections 503.51 to 503.59 of the Revised Code:

(A) "Adult cabaret" means a nightclub, bar, restaurant, or similar establishment in which persons appear in a state of nudity in the performance of their duties.

(B) "Nudity" means the showing of either of the following:

(1) The human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;

(2) The female breast with less than a fully opaque covering on any part of the nipple.

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§ 503.52 Regulatory powers

(A) A board of township trustees, by resolution, may regulate and require the registration of adult cabarets within the unincorporated territory of the township. In accordance with sections 503.51 to 503.59 of the Revised Code, for that purpose, the board, by a majority vote of all members, may adopt, amend, administer, and enforce regulations within the unincorporated territory of the township.

(B) A board may adopt regulations and amendments under this section only after public hearing at not fewer than two regular sessions of the board. The board shall cause to be published in at least one newspaper of general circulation in the township notice of the public hearings, including the time, date, and place, once a week for two weeks immediately preceding the hearings. The board

shall make available proposed regulations or amendments to the public at the office of the board.

(C) Regulations or amendments adopted by the board are effective thirty days after the date of adoption unless, within thirty days after the adoption of the regulations or amendments, the township clerk receives a petition, signed by a number of qualified electors residing in the unincorporated area of the township equal to not less than ten per cent of the total number of votes cast in that area for all candidates for the office of governor at the most recent general election for that office, requesting the board to submit the regulations or amendments to the electors of the area for approval or rejection at the next primary or general election occurring at least seventy-five days after the board receives the petition.

No regulation or amendment for which the referendum vote has been requested is effective unless a majority of the votes cast on the issue is in favor of the regulation or amendment. Upon certification by the board of elections that a majority of the votes cast on the issue was in favor of the regulation or amendment, the regulation or amendment takes immediate effect.

(D) The board shall make available regulations it adopts or amends to the public at the office of the board and shall cause to be published a notice of the availability of the regulations in at least one newspaper of general circulation in the township within ten days after their adoption or amendment.

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§ 503.53 Prohibitions

If a board of township trustees has adopted a resolution under section 503.52 of the Revised Code:

(A) No person shall engage in, conduct or carry on, or permit to be engaged in, conducted or carried on in the unincorporated areas of the township, the operation of an adult cabaret without first having obtained a permit from the board of township trustees as provided in section 503.54 of the Revised Code.

(B) No owner or operator of an adult cabaret located in the unincorporated areas of the township shall knowingly do any of the following:

(1) Refuse to allow appropriate state or local authorities, including police officers, access to the adult cabaret for any health or safety inspection, or any other inspection conducted to ensure compliance with sections 503.52 to 503.59 of the Revised Code and regulations adopted by the township under sections 503.52 or 503.56 of the Revised Code;

(2) Operate during the hours designated as prohibited hours of operation by the board of township trustees;

(3) Employ any person under the age of eighteen;

(4) Establish or operate an adult cabaret within five hundred feet from the boundaries of a parcel of real estate having situated on it a school, church, library, public playground, or township park.

(C) No person employed in an adult cabaret located in the unincorporated area of the township shall knowingly do any of the following in the performance of duties at the adult cabaret:

(1) Place his or her hand upon, touch with any part of his or her body, fondle in any manner, or massage the genitals, pubic area, or buttocks of any other person or the breasts of any female or, if the employee is a female, of any other female;

(2) Perform, offer, or agree to perform any act that would require the touching of the genitals, pubic area, or buttocks of any other person or the breasts of any female or, if the employee is a female, of any other female;

(3) Uncover the genitals, pubic area, or buttocks of any other person or the breasts of any female or, if the employee is a female, of any other female.

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§ 503.54 Application for permit

If a board of township trustees has adopted a resolution under section 503.52 of the Revised Code, the application for a permit to operate an adult cabaret shall be made to the board and shall include all of the following:

(A) An initial, nonrefundable filing fee of two hundred fifty dollars and an annual nonrefundable renewal fee of one hundred twenty-five dollars;

(B) A health and safety report of an inspection of the premises performed within thirty days of the application to determine compliance with applicable health and safety codes. Appropriate state or local authorities acting pursuant to an agreement with the board shall perform this inspection;

(C) The full name and address of any person applying for a permit, including any partner or limited partner of a partnership applicant, any officer or director of a corporate

applicant, and any stock holder holding more than two per cent of the stock of a corporate applicant, the date of birth and social security number of each individual, and the federal identification number of any partnership or corporation;

(D) Authorization for an investigation into the criminal record of any person applying for a permit;

(E) Any other information determined by the board to be necessary.

A permit issued under this section to an adult cabaret shall expire one year after the date of issuance, except that no adult cabaret shall be required to discontinue business because of the failure of the board to act on a renewal application filed in a timely manner and pending before the board on the expiration date of the establishment's permit. Each permit shall contain the name of the applicant, the address of the adult cabaret, and the expiration date of the permit.

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§ 503.55 Grounds for denial or revocation of permit

If a board of township trustees has adopted a resolution under section 503.52 of the Revised Code, it shall deny any application for a permit to operate an adult cabaret or revoke a previously issued permit, for any of the following reasons:

(A) Any of the information required for the application has been falsified or the application has not been fully completed.

(B) There has been a failure to cooperate with any required health or safety inspection.

(C) Any one of the persons named on the application has been convicted of or pleaded guilty to any violation of Chapter 2907. of the Revised Code, or any violation of any municipal ordinance or any law of another state that is substantially equivalent to any offense contained in Chapter 2907. of the Revised Code.

(D) Any person employed at the licensed adult cabaret has been convicted of or pleaded guilty to a violation of division (C) of section 503.53 of the Revised Code.

(E) The liquor control commission has revoked, under section 4301.25 of the Revised Code, a permit held by any one of the persons named on the application.

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§ 503.56 Permissible requirements

If a board of township trustees has adopted a resolution under section 503.52 of the Revised Code, the regulations adopted for that purpose may require an adult cabaret to do any of the following:

(A) Display its current permit in an area open to the public;

(B) Undergo periodic health and safety inspections to determine continual compliance with applicable health and safety codes;

(C) Be open for business only during specified hours;

(D) Comply with any other requirement reasonably thought necessary by the board.

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§ 503.57 Procedure for denial or revocation of permit

A board of township trustees acting under sections 503.51 to 503.59 of the Revised Code need not hold any hearing in connection with an order denying or revoking a permit to operate an adult cabaret. The board shall maintain a complete record of each proceeding and shall notify the applicant in writing of its order. Any person adversely affected by an order of the board denying or revoking a permit to operate an adult cabaret may appeal from the order of the board to the court of common pleas of the county in which the place of business of the applicant or permit holder is to be located or is located, as appropriate. The appeal shall be in accordance with Chapter 2506. of the Revised Code.

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§ 503.58 Disposition of fees

If a board of township trustees has adopted a resolution under section 503.52 of the Revised Code, the board shall deposit the fees collected by the township for adult cabaret permits in the township general fund and first use the fees for the cost of administering and enforcing regulations adopted under sections 503.52 and 503.56 of the Revised Code.

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§ 503.59 Penalties

(A) Whoever violates division (A) of section 503.53 of the Revised Code is guilty of a misdemeanor of the first degree for a first offense, and a felony of the fourth degree for a second offense.

(B) Whoever violates division (B) or (C) of section 503.53 of the Revised Code is guilty of a misdemeanor of the third degree.

Ohio Revised Code

§ 2907.09 Public indecency

(A) No person shall recklessly do any of the following, under circumstances in which his or her conduct is likely to be viewed by and affront others, not members of his or her household:

(1) Expose his or her private parts, or engage in masturbation;

(2) Engage in sexual conduct;

(3) Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation.

(B) Whoever violates this section is guilty of public indecency. Except as otherwise provided in this division, public indecency is a misdemeanor of the fourth degree. If the offender previously has been convicted of or pleaded guilty to one violation of this section, public indecency is a misdemeanor of the third degree. If the offender previously has been convicted of or pleaded guilty to two violations of this section, public indecency is a misdemeanor of the second degree. If the offender previously has been convicted of or pleaded guilty to three or more violations of this section, public indecency is a misdemeanor of the first degree.

Ohio Revised Code

§ 2907.32 Pandering obscenity

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard;

(2) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when the offender is reckless in that regard;

(4) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged;

(5) Buy, procure, possess, or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist,

sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a felony of the fifth degree. If the offender previously has been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

Ohio Revised Code

§ 2929.14 Prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), or (G) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

* * *

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

* * *

Ohio Revised Code

§ 2929.18 Financial sanctions

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

* * *

(3) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

* * *

(d) For a felony of the fourth degree, not more than five thousand dollars;

* * *

Ohio Revised Code

§ 2929.24 Misdemeanor jail terms

(A) Except as provided in section 2929.22 or 2929.23 of the Revised Code and unless another term is required or authorized pursuant to law, if the sentencing court imposing a sentence upon an offender for a misdemeanor elects or is required to impose a jail term on the offender pursuant to this chapter, the court shall impose a definite jail term that shall be one of the following:

(1) For a misdemeanor of the first degree, not more than one hundred eighty days;

* * *

(3) For a misdemeanor of the third degree, not more than sixty days;

* * *

Ohio Revised Code

§ 2929.28 Financial sanctions

(A) In addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a misdemeanor, including a minor misdemeanor, may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section. If the court in its discretion imposes one or more financial sanctions, the financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

* * *

(2) A fine of the type described in divisions (A)(2)(a) and (b) of this section payable to the appropriate entity as required by law:

(a) A fine in the following amount:

(i) For a misdemeanor of the first degree, not more than one thousand dollars;

* * *

(iii) For a misdemeanor of the third degree, not more than five hundred dollars;

* * *

RESOLUTION 99-15

RESOLUTION AMENDING ADULT CABARET REGULATIONS AND ORDERING NOTICE.

Whereas:

A. The Board of Trustees of Union Township finds that, in order to protect the public health, safety and welfare, it is necessary to regulate adult cabarets within the unincorporated areas of the township, and to establish a permit system for such establishments and their employees, pursuant to Ohio Revised Code sections 503.51 to 503.59; and

B. The Board of Trustees has relied upon information provided and reviewed by counsel and staff relating to the secondary effects in other cities including: Garden Grove, California; Los Angeles, California, Indianapolis, Indiana; Minneapolis, Minnesota; Cleveland, Ohio; Oklahoma City, Oklahoma; Austin, Texas; Beaumont, Texas; Houston, Texas; Tucson, Arizona; Phoenix, Arizona and Seattle, Washington; and

C. From the review of other cities' studies and citizen comments regarding the secondary effects of sexually oriented businesses received during public hearings, there is convincing evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both existing businesses around them and the surrounding residential areas, causing among other secondary effects and nuisance effects, increased crime and diminution of property values; and

D. It is not the intent of this resolution to suppress any speech activities protected by the First Amendment, but to enact content neutral regulations which address the

adverse secondary effects of sexually oriented businesses; and

E. As required by law, at least two public hearings on the proposed regulations were held pursuant to notice at regular sessions of the Board on July 13, 1999 and on August 10, 1999, at which interested persons were given an opportunity to state their views. It is therefore

Resolved, that:

1. The regulations governing adult cabarets and their employees within the unincorporated areas of the township, a copy of which is attached to and made a part of this resolution, are hereby adopted.

2. The Clerk is directed to keep the regulations available for public inspection and copying at the office of the Board.

3. The Clerk is further directed to cause the following notice to be published in a newspaper of general circulation in the township, within ten days after the date of this resolution:

The Board of Trustees of Union Township, Clermont County, Ohio has adopted regulations governing adult cabarets and their employees. Such regulations are available to the public for inspection and copying at the office of the Board, at 4312 Glen Este Withamsville Road, Cincinnati, Ohio 45245

4. This resolution replaces all prior adult cabaret resolutions.

5. The regulations take effect thirty days after the date of this resolution, unless a sufficient petition is timely filed requesting the Board to submit the

same to the electors for approval or rejection, as provided by Ohio Revised Code Section 503.52.

UNION TOWNSHIP, CLERMONT COUNTY, OHIO REGULATIONS GOVERNING ADULT CABARETS AND EMPLOYEES

(A) Definitions

As used in these regulations:

(1) **"Adult Cabaret"** means a nightclub, bar, restaurant, or similar establishment in which persons appear in a state of nudity in the performance of their duties.

(2) **"Board"; "Board of Trustees"** means the Union Township Board of Trustees.

(3) **"Employee"** means anyone who works within or for the adult cabaret, with or without compensation, at the direction or control of the owner, manager or operator.

(4) **"Nudity"** means the showing of either of the following:

(a) The human male or female genitals, pubic area. or buttocks with less than a fully opaque covering;

(b) The female breast with less than a fully opaque covering on any part of the nipple.

(5) **"Permit"** means a written warrant to operate an adult cabaret, issued pursuant to these regulations.

(B) **Scope of Regulations**

(1) These regulations govern adult cabarets within the unincorporated area of the township, and the owners, operators, persons in charge, and employees of such establishments.

(C) **Permit Required**

(1) No person shall engage in, conduct or carry on an adult cabaret, or permit an adult cabaret to be engaged in, conducted or carried on, in or on premises owned or controlled by him, without a valid, current permit issued pursuant to these regulations. A separate permit is required for each location at which an Adult Cabaret establishment is operated.

(D) **Application For Permit**

(1) Application for an original or renewal permit shall be in writing, addressed to the Board of Trustees of Union Township, Clermont County, Ohio.

(2) An application for a renewal permit shall be filed not later than thirty days prior to expiration of the permit to be renewed.

(3) All applications shall be filed with the Clerk.

(4) A non-refundable filing fee shall be paid at the time of filing the application, as follows:

(a) $250 for an initial permit to operate an adult cabaret;

(b) $125 for a renewal permit to operate an adult cabaret;

(5) An application for an initial permit to operate an adult cabaret shall contain the following:

(a) The address where the adult cabaret is operated, or is to be operated, including a legal description of the property;

(b) The status of the applicant as an individual, partnership or limited partnership, domestic or foreign corporation, or other entity;

(c) The full name, residence address, date of birth, and social security number of the applicant or the person applying on behalf of a partnership, corporation, or other entity;

(d) If the applicant is a partnership or limited partnership, the name of the partnership; the status of the partnership as a general or limited partnership; the state or other jurisdiction under which it is organized; the address of its principal office; the address of its principal office in Ohio; its federal employer identification number; the name and address of its statutory agent in Ohio: the full name, residence address, date of birth, and social security number of each partner; and the status of each partner as a general or limited partner;

(e) If the applicant is a corporation, the name of the corporation: the state or other jurisdiction under which it is organized; the address of its principal identification number; the name and address of its statutory agent in Ohio; and the full name, residence address, date of birth, and social security number of each shareholder holding more than two per cent of the applicant's stock. If any shareholder is a corporation or a general or limited

partnership, the same information shall be included for such shareholder as is required for an applicant that is a corporation or general or limited partnership;

(f) The full name, residence address, date of birth, and social security number of each person employed by the adult cabaret or whose employment is contemplated by the establishment, and the capacity in which such person is or is to be employed;

(g) A statement that the applicant and, to the applicant's knowledge, the persons named in the application have never been convicted of or pleaded guilty to an offense under Ohio Revised Code Chapter 2907 or a substantially equivalent offense under a municipal ordinance in Ohio, or under the laws of another state or territory or of the United States, or under a municipal ordinance in any such jurisdiction;

(h) A statement by the applicant for a permit to operate an adult cabaret that the Ohio Liquor Control Commission has never, pursuant to Ohio Revised Code section 4301.25, or any similar statue, law or municipal code from another state, revoked a permit held by the applicant or any person or entity named in the application;

(i) Authorization for an investigation into the background, including any criminal record, of the applicant and any person or entity named in the application, including authorization to conduct subsequent investigations to supplement or update the information;

(j) The applicant's agreement to abide by these regulations and the laws of Ohio, and any amendments, additions, or reenactment thereof;

(k) A plat of the property described in (a) above showing the property lines, building locations, parking areas, entry ways, and lighting systems;

(l) No application shall be considered complete until it contains all of the information required by this section (D).

(6) An applicant for a renewal permit shall only be required to present new information not already on file with the Clerk. (A review of the existing permit shall be completed at the request of the applicant.)

(E) Inspection and Investigation

Upon receipt of an application for a permit or renewal permit to operate an adult cabaret, the Clerk shall refer the applicant to the township police department to be fingerprinted, and shall notify the Chief of such department to conduct an investigation into the background of the applicant and, in the case of a permit, into the background of other persons or entities named in the application. A written report of the results of the investigation shall be prepared by the investigating officer or agency and filed with the Clerk and shall become part of the application for a permit. The failure of the Board of Trustees to receive the reports shall not be cause for an application to be incomplete or for the denial of a permit and shall affect the time for making a decision upon an application as set forth in Section F(1).

(F) Action on Application for Permit & Renewal Permit

(1) The Board shall hear any application for a permit or renewal permit, at a public hearing, during a regular meeting or during a special hearing and shall act, upon such application for permit within thirty days after receiving the application as described in section (D). The applicant shall have the opportunity to present information, evidence and testimony to the Board, at a public hearing regarding the application.

(2) The Board shall approve the application unless:

(a) The application is incomplete, contains any false information, or fails to comply with these regulations;

(b) The applicant is a limited partnership, corporation, or other entity that is not in good standing in the jurisdiction where organized or is not authorized to do business in Ohio;

(c) The operation of an adult cabaret at the specified premises would violate the existing zoning resolution;

(d) The applicant or any person named in the application for a permit or renewal permit to operate an adult cabaret is under age eighteen,

(e) The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret within the past five years has been convicted of or pleaded guilty to an offense under Ohio Revised Code Chapter 2907 or a substantially equivalent offense under a municipal ordinance in Ohio,

or under the laws of another state or territory or of the United States, or under a municipal ordinance in any such jurisdiction:

(f) The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret or any person employed at the adult cabaret, has been convicted of or pleaded guilty to a violation of Ohio Revised Code section 503.53(C); or

(g) The applicant has violated these regulations.

(3) If the application is denied, the Clerk shall promptly notify (within five calendar days) the applicant in writing of the order denying the application. If the Board approves the application, the Clerk shall promptly issue to the applicant a permit (within five calendar days).

(4) A permit or renewal permit to operate an adult cabaret shall contain the address of the permit premises, the name and address of the permit holder, and the date of issuance and date of expiration of the permit.

(G) Expiration of Permit

A permit to operate an adult cabaret is valid for one year, and expires on the anniversary of the date of issuance, unless a permitee has applied for a renewal permit or unless the permit was revoked as provided in this resolution.

(H) Display of Permit

The permit to operate an adult cabaret shall be prominently displayed in an area of the premises open to the public.

(I) Revocation of Permit

The Board of Trustees may, upon discovery of a violation of this resolution, or on any of the same grounds listed in section (F)(2) for denial of the permit, including any such grounds arising or discovered after the issuance of a permit, set a public hearing to be conducted not later than 30 days after the notice of the violation to the permittee. The Clerk shall promptly notify the permittee in writing of the date and time of the public hearing and the grounds for revocation. At the public hearing the Board shall allow the permittee to present evidence regarding the alleged violation. Pursuant to the notice and at the conclusion of the hearing the Board may dismiss or sustain the allegations. The Board may revoke the permit upon a finding of a violation of these regulations. The Board will publicly announce the decision, at the conclusion of the hearing and will further direct the Clerk to notify the permitee of the decision by certified mail, mailed within five days of the decision.

(J) Prompt Judicial Review

(1) The applicant who applies for a new permit or a renewal permit and is denied by the Board of Trustees (Board), may appeal the action of the Board in accordance with chapter 2506 of the Ohio Revised Code. Pending the outcome of the appeal, the applicant, upon written request filed

with the Clerk, shall be issued a temporary permit. The temporary permit will allow the operation of the Adult Cabaret until such time as the appeal process as set forth in Chapter 2506 of the Ohio Revised Code has been completed. During the appeal process the applicant shall be required to follow all other guidelines set forth in this resolution.

(2) A permitee, whose permit is revoked, by the Board of Trustees (Board), may appeal the action of the Board in accordance with chapter 2506 of the Ohio Revised Code. Pending the outcome of the appeal, the applicant, upon written request filed with the Clerk, shall be issued a temporary permit. The temporary permit will allow the operation of the Adult Cabaret until such time as the appeal process as set forth in Chapter 2506 of the Ohio Revised Code has been completed. During the appeal process, the applicant shall be required to follow all other guidelines set forth in this resolution.

(K) Transfer of Permit

A permittee shall not transfer the permit to a location other than the premises designated in the application. A permittee shall not transfer the permit to any other person or entity.

(L) Inspections, Investigations, and Physical Examinations

(1) Township personnel or agents may at all reasonable times inspect permit premises to insure continued compliance with the laws of Ohio and these regulations.

(2) At any time there is reasonable cause to do so, the Board of Trustees may order a background investigation, including the criminal record, if any, of any permittee, person named in the application for a permit, employee of a permittee. Written reports of investigations shall be filed with the Clerk.

(M) Rules Governing Operation of An Adult Cabaret

(1) Adult cabarets shall close not later than 12:00 Midnight or not later than the closing time required under its permit to sell alcoholic beverages, whichever is later and shall not reopen earlier than 12:00 Noon.

(2) The owner, operator, or person in charge of the adult cabaret shall allow state or local authorities, including law enforcement officers, access to any and all parts of the premises for the purpose of making any health or safety inspection pursuant to these regulations, and shall cooperate in any background investigation.

(3) No person under age eighteen shall be employed or contracted by or in the adult cabaret in any capacity, whether full-time or part-time, and with or without remuneration or compensation in any form.

(4) The permittee shall file a list of employees with the Clerk, and shall file an amended list at any time there is a change in personnel(within 20 calendar days of any change). The list shall state the name, address, date of birth, and position of each employee.

(5) The owner, operator, or person in charge of the adult cabaret shall exercise adequate supervision

to insure that the employees comply at all times with these regulations and the laws of Ohio.

(6) All off street parking areas and premises entries of the business shall be illuminated from dusk to closing hours of operation with a lighting system which provide an average maintained horizontal illumination of one (1.0) foot candle of light on the parking surface.

(7) The permittee shall not allow any portion of the interior premises to be visible from outside the premises.

(N) Rules Governing Conduct of Employees

(1) A person under age eighteen shall not accept or continue employment by or in an adult cabaret in any capacity, whether full-time or part-time, and with or without remuneration or compensation in any form.

(2) No person shall accept or continue employment by any adult cabaret that does not have a valid, current permit issued pursuant to these regulations.

(3) Any employee of an adult cabaret shall cooperate with any background investigation under these regulations.

(4) No employee of an adult cabaret, in the performance of his or her duties, shall do any of the following:

(a) Place his or her hand upon, touch with any part of his or her body, fondle in any manner, or massage the genitals, pubic area, or buttocks of any other person or the breasts

of any female or, if the employee is a female, of any other female;

(b) Perform, offer, or agree to perform any act that would require the touching of the genitals, pubic area, or buttocks of any other person or the breasts of any female or, if the employee is a female, of any other female;

(c) Uncover the genitals, pubic area, or buttocks of any other person or the breasts of any female or, if the employee is a female, of any other female.

(O) Records

The Clerk shall keep a complete record of all documents and proceedings under these regulations, including without limitation applications, reports, copies of permits issued, notices, correspondence, permittee employee lists, Board proceedings resolutions and orders, and petitions. All documents shall be endorsed by the Clerk with the date of filing.

(P) Deposit and Use of Fees

Fees collected by the township for permits under these regulations shall be deposited in the township general fund, and first applied to the cost of administering and enforcing these regulations.

(Q) Severability

Should any section or provision of this Resolution be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of the Resolution

as a whole, or any part thereof other than the part so declared to be unconstitutional or invalid.

(R) Repeal of Conflicting Resolutions

All resolutions governing the regulations and licensing of adult cabarets in conflict with this resolution or inconsistent with the provisions of this resolution are hereby repealed to the extent necessary to give this resolution full force and effect.

RESOLUTION 00-22

RESOLUTION AMENDING ADULT CABARET REGULATIONS AND ORDERING NOTICE.

Whereas:

A. The Board of Trustees of Union Township finds that, in order to protect the public health, safety and welfare, it is necessary to regulate adult cabarets within the unincorporated areas of the township, and to establish a permit system for such establishments and their employees, pursuant to Ohio Revised Code sections 503.51 to 503.59; and

B. The Board of Trustees has relied upon information provided and reviewed by counsel and staff relating to the harmful secondary effects of sexually oriented businesses in other cities including: Garden Grove, California; Los Angeles, California, Indianapolis, Indiana; Minneapolis, Minnesota; Cleveland, Ohio; Oklahoma City, Oklahoma; Austin, Texas; Beaumont, Texas; Houston, Texas; Tucson, Arizona; Phoenix, Arizona and Seattle, Washington; and

C. From the review of other cities' studies and citizen comments regarding the secondary effects of sexually oriented businesses received during public hearings and case law, there is convincing evidence that adult cabarets, because of their very nature, have a deleterious effect on both existing businesses around them and the surrounding residential areas, causing among other secondary effects and nuisance effects, increased crime and diminution of property values; and

D. The Board of Trustees upon further reliance on the decision on preliminary injunction in Déjà vu of

Cincinnati v. Union Township Board of Trustees et al. U.S. Dist Court So. Dist. Of Ohio Case # C-1-99-726 and the U.S. Supreme Court decision in Erie v. P.A.P.'s A.M. 529 U.S. 277 120 S. Ct. 1382 (2000) finds that based upon these cases there is clear and convincing evidence that sexually oriented businesses and adult cabarets in particular, cause the harmful secondary effects referred to in Section C. above and that Union Township has authority to regulate adult cabarets in order to diminish or erase those harmful secondary effects; and

E. It is not the intent of this resolution to suppress any speech activities protected by the First Amendment, but to enact content neutral regulations which address the adverse secondary effects of sexually oriented businesses including adult cabarets; and

F. As required by law, at least two public hearings on the proposed regulations were held pursuant to notice at regular sessions of the Board on November 14, 2000 and on November 28, 2000, at which interested persons were given an opportunity to state their views. It is therefore Resolved, that:

1. The regulations governing adult cabarets and their employees within the unincorporated areas of the township, a copy of which is attached to and made a part of this resolution, are hereby adopted.

2. The Clerk is directed to keep the regulations available for public inspection and copying at the office of the Board.

3. The Clerk is further directed to cause the following notice to be published in a newspaper of general

circulation in the township, within ten days after the date of this resolution:

The Board of Trustees of Union Township, Clermont County, Ohio has adopted regulations governing adult cabarets and their employees. Such regulations are available to the public for inspection and copying at the office of the Board, at 4312 Glen Este Withamsville Road, Cincinnati, Ohio 45245.

4. This resolution replaces all prior adult cabaret resolutions.

5. The regulations take effect thirty days after the date of this resolution, unless a sufficient petition is timely filed requesting the Board to submit the same to the electors for approval or rejection, as provided by Ohio Revised Code Section 503.52.

UNION TOWNSHIP, CLERMONT COUNTY,
OHIO REGULATIONS
GOVERNING ADULT CABARETS AND EMPLOYEES

(A) **Definitions**

As used in these regulations:

(1) **"Adult Cabaret"** means a nightclub, bar, restaurant, or similar establishment in which persons appear in a state of nudity in the performance of their duties.

(2) **"Board"; "Board of Trustees"** means the Union Township Board of Trustees.

(3) **"Employee"** means anyone who works for the adult cabaret, with or without compensation, at

the direction or control of the owner, manager or operator.

(4) **"Nudity"** means the showing of either of the following:

(a) The human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;

(b) The female breast with less than a fully opaque covering on any part of the nipple.

(5) **"Permit"** means a written warrant to operate an adult cabaret, issued pursuant to these regulations.

(B) Scope of Regulations

These regulations govern adult cabarets within the unincorporated area of the township, and the owners, operators, persons in charge, and employees of such establishments.

(C) Permit Required

No person shall engage in, conduct or carry on an adult cabaret, or permit an adult cabaret to be engaged in, conducted or carried on, in or on premises owned or controlled by him, without a valid, current permit issued pursuant to these regulations. A separate permit is required for each location at which an Adult Cabaret establishment is operated.

(D) Application For Permit

(1) Application for an original or renewal permit shall be in writing, addressed to the Board of Trustees of Union Township, Clermont County, Ohio.

(2) An application for a renewal permit shall be filed not later than thirty days prior to expiration of the permit to be renewed.

(3) All applications shall be filed with the Clerk.

(4) A non-refundable filing fee shall be paid at the time of filing the application, as follows:

(a) $250 for an initial permit to operate an adult cabaret;

(b) $125 for a renewal permit to operate an adult cabaret;

(5) An application for an initial permit to operate an adult cabaret shall contain the following:

(a) The address where the adult cabaret is operated, or is to be operated, including a legal description of the property;

(b) The status of the applicant as an individual, partnership or limited partnership, domestic or foreign corporation, or other entity;

(c) The full name, residence address and date of birth, of the applicant or the person applying on behalf of a partnership, corporation, or other entity;

(d) If the applicant is a partnership or limited partnership, the name of the partnership; the status of the partnership as a general or limited partnership; the state or other jurisdiction under which it is organized; the address of its principal office; the address of its principal office in Ohio; its federal employer identification number and the name and address of its statutory agent in Ohio.

(e) If the applicant is a corporation, the name of the corporation: the state or other jurisdiction under which it is organized; the address of its principal office; the address of its principal office in Ohio; its federal employer identification number and the name and address of its statutory agent in Ohio.

(f) A statement by the applicant for a permit to operate an adult cabaret that the Ohio Liquor Control Commission has never, pursuant to Ohio Revised Code section 4301.25, or any similar statue [sic], law or municipal code from another state, revoked a permit held by the applicant or any person or entity named in the application;

(g) Authorization for an investigation into the background, including any criminal record, of the applicant and any person or entity named in the application, including authorization to conduct subsequent investigations to supplement or update the information;

(h) The applicant's agreement to abide by these regulations and the laws of Ohio, and any amendments, additions, or reenactment thereof;

(i) A plat of the property described in (a) above showing the property lines, building locations, parking areas, entry ways, and lighting systems;

(6) An applicant for a renewal permit shall only be required to present new information not already on file with the Clerk. (A review of the existing permit shall be completed at the request of the applicant.)

(E) Inspection and Investigation

Upon receipt of an application for a permit or renewal permit to operate an adult cabaret, the Clerk shall notify the Chief of the police department to conduct an investigation into the background of the applicant and, in the case of a permit, into the background of other persons or entities named in the application. A written report of the results of the investigation shall be prepared by the investigating officer or agency and filed with the Clerk and shall become part of the application for a permit. The failure of the Board of Trustees to receive the reports shall not be cause for an application to be incomplete or for the denial of a permit and shall not affect the time for making a decision upon an application as set forth in Section F (1).

(F) Action on Application for Permit & Renewal Permit

(1) The Board shall hear any application for a permit or renewal permit, at a public hearing, during a regular meeting or during a special hearing and shall act, upon such application for permit within thirty days after receiving the application as described in section (D). The applicant shall have the opportunity to present information, evidence, and testimony to the Board, at a public hearing regarding the application.

(2) The Board shall approve the application unless:

(a) The application is incomplete, contains any false information, or fails to comply with these regulations;

(b) The applicant is a limited partnership, corporation, or other entity that is not in good standing in the jurisdiction where organized or is not authorized to do business in Ohio;

(c) The operation of an adult cabaret at the specified premises would violate the existing zoning resolution;

(d) The applicant or any person named in the application for a permit or renewal permit to operate an adult cabaret is under age eighteen;

(e) The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret within the past three years has been convicted of or pleaded guilty to an offense under Ohio Revised Code Chapter 2907 or a substantially equivalent offense under a municipal ordinance in Ohio, or under the laws of another state or territory or of the United States, or under a municipal ordinance in any such jurisdiction:

(2) (f) The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret or any person employed at the adult cabaret, has been convicted of or pleaded guilty to a violation of Ohio Revised Code section 503.53(C) within the past 5 years; or

(g) The applicant has violated these regulations.

(3) If the application is denied, the Clerk shall promptly notify (within five calendar days) the applicant in writing of the order denying the application. If the Board approves the application, the Clerk shall promptly issue to the applicant a permit (within five calendar days).

(4) A permit or renewal permit to operate an adult cabaret shall contain the address of the permit premises, the name and address of the permit holder, and the date of issuance and date of expiration of the permit

(G) **Expiration of Permit**

A permit to operate an adult cabaret is valid for one year, and expires on the anniversary of the date of issuance, unless a permitee has applied for a renewal permit or unless the permit was revoked as provided in this resolution.

(H) **Display of Permit**

The permit to operate an adult cabaret shall be prominently displayed in an area of the premises open to the public.

(I) **Revocation of Permit**

The Board of Trustees may, upon discovery of a violation of this resolution, or on any of the same grounds listed in section (F)(2) for denial of the permit, including any such grounds arising or discovered after the issuance of a permit, set a public hearing to be conducted not later than 30 days after the notice of the violation to the permittee. The Clerk shall promptly notify the permittee in writing of the date and time of the public hearing and the grounds for revocation. At the public hearing the Board shall allow the permittee to present evidence regarding the alleged violation. Pursuant to the notice and at the conclusion of the hearing the Board may dismiss or sustain the allegations. The Board may revoke the permit upon a finding of a violation of these regulations. The Board will publicly announce the decision, at the conclusion of the hearing

and will further direct the Clerk to notify the permitee of the decision by certified mail, mailed within five days of the decision.

(J) Prompt Judicial Review

(1) The applicant who applies for a new permit or a renewal permit and is denied by the Board of Trustees (Board), may appeal the action of the Board in accordance with chapter 2506 of the Ohio Revised Code. Pending the outcome of the appeal, the applicant, upon written request filed with the Clerk, shall be issued a temporary permit (without charge). The temporary permit will allow the operation of the Adult Cabaret until such time as the appeal process as set forth in Chapter 2506 of the Ohio Revised Code has been completed. During the appeal process, the applicant shall be required to follow all other guidelines set forth in this resolution.

(2) A permitee, whose permit is revoked, by the Board of Trustees (Board), may appeal the action of the Board in accordance with chapter 2506 of the Ohio Revised Code. Pending the outcome of the appeal the applicant upon written request filed with the Clerk, shall be issued a temporary permit (without charge). The temporary permit will allow the operation of the Adult Cabaret until such time as the appeal process as set forth in Chapter 2506 of the Ohio Revised Code has been completed. During the appeal process, the applicant shall be required to follow all other guidelines set forth in this resolution.

(K) Transfer of Permit

A permittee shall not transfer the permit to a location other than the premises designated in the application. A

permittee shall not transfer the permit to any other person or entity.

(L) Investigations

At any time there is reasonable cause to do so, the Board of Trustees may order a background investigation, including the criminal record, if any, of any permittee, person named in the application for a permit, employee of a permittee. Written reports of investigations shall be filed with the Clerk.

(M) Rules Governing Operation of An Adult Cabaret

(1) Adult cabarets shall close not later than 12:00 Midnight or not later than the closing time required under its permit to sell alcoholic beverages, whichever is later and shall not reopen earlier than 12:00 Noon.

(2) No person under age eighteen shall be employed or contracted by or in the adult cabaret in any capacity, whether full-time or part-time, and with or without remuneration or compensation in any form.

(3) The permittee shall file a list of employees with the Clerk, and shall file an amended list at any time there is a change in personnel (within 20 calendar days of any change). The list shall state the name, date of birth, and position of each employee.

(4) The owner, operator, or person in charge of the adult cabaret shall exercise adequate supervision to insure that the employees comply at all times with these regulations and the laws of Ohio.

(5) All off street parking areas and premises entries of the business shall be illuminated from dusk to

closing hours of operation with a lighting system which provide an average maintained horizontal illumination of one (1.0) foot candle of light on the parking surface.

(6) The permittee shall not allow any portion of the interior premises to be visible from outside the premises.

(N) Rules Governing Conduct of Employees

(1) A person under age eighteen shall not accept or continue employment by or in an adult cabaret in any capacity, whether full-time or part-time, and with or without remuneration or compensation in any form.

(2) No person shall accept or continue employment by any adult cabaret that does not have a valid current permit issued pursuant to these regulations.

(3) Any employee of an adult cabaret shall cooperate with any background investigation under these regulations.

(4) No employee of an adult cabaret, in the performance of his or her duties, shall knowingly do any of the following:

(a) Place his or her hand upon, touch with any part of his or her body, fondle in any manner, or massage the genitals, pubic area, or buttocks of any other person.

(b) Perform, offer, or agree to perform any act that would require the touching of the genitals, pubic area, or buttocks of any other person or the breasts of any female or, if the employee is a female, of any other female;

(4) (c) Uncover the genitals, pubic area, or buttocks of any other person or the breasts of any female or, if the employee is a female, of any other female.

(d) Place his or her hand upon, touch with any part of his or her body, fondle in any manner, or massage the breasts of any other female.

(e) Perform, offer, or agree to perform any act that would require the touching of the breasts or any other female.

(O) Records

The Clerk shall keep a complete record of all documents and proceedings under these regulations, including without limitation applications, reports, copies of permits issued, notices, correspondence, permittee employee lists. Board proceedings, resolutions and orders, and petitions. All documents shall be endorsed by the Clerk with the date of filing.

(P) Deposit and Use of Fees

Fees collected by the township for permits under these regulations shall be deposited in the township general fund, and first applied to the cost of administering and enforcing these regulations.

(Q) Severability

Should any section or provision of this Resolution be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of the Resolution as a whole, or any part thereof other than the part so declared to be unconstitutional or invalid.

(R) Repeal of Conflicting Resolutions

All resolutions governing the regulations and licensing of adult cabarets in conflict with this resolution or inconsistent with the provisions of this resolution are hereby repealed to the extent necessary to give this resolution full force and effect.

ARTICLE 12

SEXUALLY ORIENTED BUSINESSES

1200. Purpose.

It is the purpose and intent of the Article to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the Township and to establish reasonable and uniform regulations to prevent any deleterious location and concentration of sexually oriented businesses within the Township, thereby reducing or eliminating the adverse secondary effects from such sexually oriented businesses. The provisions of this Article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative material, including sexually oriented materials. Similarly, it is not the intent nor effect of this Article to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of the Article to condone or legitimize the distribution of obscene material.

1201. Establishment and Classification of Businesses Regulated.

1. The establishment of a sexually oriented business shall be permitted as a Conditional Use only in the B-1, Business Zone and shall be subject to the following restrictions:

   A. No person shall cause or permit the establishment of any of the following sexually oriented businesses, as herein defined, within one thousand (1000) feet of the property line of another such business or within one thousand (1000) feet

of the property line of any religious institution, school, boys' club, girls' club, dance or gymnastics studio, or similar existing youth organization, or public park or public building, or within one thousand (1000) feet of the property line of any property zoned for residential use or used for residential purposes. Sexually oriented businesses are classified and include the following:

a. adult arcade;

b. adult bookstore, adult novelty store or adult video store;

c. adult cabaret;

d. adult motel;

e. adult motion picture theatre;

f. adult theatre;

g. massage parlor;

h. sexual encounter establishment;

i. escort agency; or

k. nude model studio.

2. Sexually oriented businesses may also be permitted as a Conditional Use within retail shopping centers in the B-1, Business Zone and within the B-1, Business Zone wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, schools, religious institutions, boys' club, girls' clubs, dance, gymnastics studio, or similar existing youth organization, public parks or buildings or residential districts or uses without regard to the distance requirements of Subsection 1 above.

1202. Location Restrictions and Requirements for Sexually Oriented Businesses.

The Union Township Zoning Resolution hereby requires that sexually oriented businesses shall be permitted only as provided in Section 1201 in which such use is listed as permissible. Conditional Use Permits for sexually oriented businesses shall be required to be renewed annually. In addition, any sexually oriented business shall be subject to the following restrictions:

1. No sexually oriented business shall be operated within one thousand (1000) feet of the property line of: (a) any religious institution; (b) any school, boys' club, girls' club, dance, gymnastics studio, or similar existing youth organization (c) a public park or public building; (d) any property zoned for or used for residential purposes except as provided in Section 1201.2.

2. No sexually oriented business shall be operated within one thousand (1000) feet of the property line of another such business, which will include: any adult arcade, adult book store, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, massage parlor or any sexual encounter establishment.

3. No more than one sexually oriented business shall be operated, established, or maintained within the same building, structure, or portion thereof, as another sexually oriented business.

4. All applicants for a Conditional Use for Zoning Certificate for a sexually oriented business that falls under the classification for a Cabaret shall be required to successfully apply for and receive a Cabaret License from Union Township prior to submitting an application for a Conditional Use

permit. Proof of having obtained a Cabaret License shall be required as part of the submission requirements.

5. Nothing in this Article shall prohibit a person appearing in a state of nudity for a modeling class operated:

   a. by a proprietary school, licensed by the State of Ohio; a college, junior college, or university supported entirely or partly by taxation;

   b. by a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or

   c. in a structure:

      (1) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing;

      (2) where, in order to participate in a class a student must enroll at least three (3) days in advance of the class; and

      (3) where no more than one nude model is on the premises at any one time.

1203. Measurement of Distance.

As regarding Section 1201 and 1202, distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures, from the property line of each business. The distance between any sexually oriented

business and any religious institution, public or private elementary or secondary school, boys' club, girls' club, or similar existing youth organization, or public park or public building or any properties zoned for residential use or used for residential purposes shall also be measured in a straight line, without regard to intervening structures or objects from the property line where the sexually oriented business is conducted, to the nearest property line of the premises of a religious institution, public or private elementary or secondary school, boys' club, girls' club, or similar existing youth organization, or public park or public building or any properties zoned for residential use or used for residential purposes.

1204. Permit Required.

1. No sexually oriented business shall be permitted to operate without a valid Zoning Certificate for a Conditional Use for a sexually oriented business permit issued by the Township for the particular type of business.

2. An application for a permit must be made on a form provided by the Township. Any person desiring to operate a sexually oriented business shall file with the Township an original and seven copies of all materials required for submission.

3. An application fee shall also be submitted in accordance with the schedule determined by the Board of Trustees.

4. All applications for sexually oriented businesses must meet the requirements for Site Plan Review in Article 11.

5. All property included in a sexually oriented business must meet all the underlying conditions applicable in a B-1 Business District.

6. The completed application shall contain the following information and shall be accompanied by the following documents:

a. A map, drawn to a scale sufficient and marked to indicate all land uses within one thousand (1000) feet of the property lines to be certified; the property lines of any established religious institution/ synagogue, school, or public park or recreation area within one thousand (1000) feet of the property to be certified; and the property lines of any residentially zoned area or residential property within one thousand (1000) feet of the property to be certified. For purposes of this Section, a use shall be considered existing or established if it is in existence at the time an application is submitted.

7. Denial of Application for Permit.

   a. The Zoning Director or his designee, shall deny the application for any of the following reasons:

      (1) An applicant has failed to provide information required by this Section or permit application for the issuance of the permit or has falsely answered a question or request for information on the application form.

      (2) The application or permit fees required by this Article have not been paid.

      (3) An applicant of the proposed business is in violation of or is not in compliance

with the zoning locational requirements for a sexually oriented business.

(4) If a person applies for a permit for a business or site for which a denial of a previous application for a permit at the location was issued, and there has not been an intervening change in the circumstances which could reasonably be expected to lead to a different decision regarding the former reasons for denial, the application shall be denied.

b. If the Zoning Director or his designee, denies the application, he shall notify the applicant of the denial and state the reason(s) for the denial.

1205. Nonconforming Use.

Any sexually oriented business lawfully operating on the effective date of this Article that is in violation of this Article shall be deemed a nonconforming use. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two (2) or more sexually oriented businesses are within one thousand (1000) feet of the property lines of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at the particular location is the conforming use and the later established business(es) is nonconforming.

1206. Expiration of Conditional Use Permit Under This Article.

1. Each Conditional Use permit for a sexually oriented business shall expire one (1) year from the date of issuance and may be renewed only by making a new application. Application(s) for renewal shall be made at least thirty (30) days before the expiration date. Renewal applications made less than thirty (30) days before the expiration date will result in the permit expiration.

2. When the Zoning Director or his designee, denies renewal of the permit, the applicant shall not be issued a permit under this Article for one (1) year from the date of denial. If, subsequent to denial, the Township or its designee finds that the basis for denial or the renewal of the permit has been corrected, the applicant shall be granted a permit if at least ninety (90) days have elapsed since the date denial became final.

1207. Revocation of Permit.

1. The Zoning Director or his designee, shall revoke a permit and issue a Stop Work Order if he determines that any of the requirements of permit are no longer being met, or if a nonconforming use has been altered in any way.

2. When the Zoning Director or his designee, revokes a permit, the revocation shall continue for one (1) year and the permittee shall not be issued a sexually oriented business permit for one (1) year from the date the revocation became effective.

1208. Appeal of Permit Denial or Revocation.

After denial of an application, or denial of a renewal of an application, or revocation of a permit, the applicant or permittee may seek prompt review of such administrative action through the Board of Zoning Appeals.

1209. Advertising and Lighting.

1. No sign, advertisement, promotional material, or display of any type shall be shown or exhibited so as to be visible to the public from pedestrian sidewalks or walkways, public or semi-public areas, nor the public right-of way [sic] of any street or roadway except as permitted under paragraph 4 of this section.

2. No displays or exhibits of materials and/or performances at such sexually oriented business shall be allowed in any advertising which is visible outside the premises. This prohibition shall not extend to advertising of the existence or location of such sexually oriented business.

3. The permittee shall not allow any portion of the interior premises to be visible from outside the premises.

4. Pursuant to sections 906.1 and 906.2, each sexually oriented business shall be permitted both wall and freestanding signs which announce the names of the business. No off premise or portable signs shall be permitted.

5. All off-street parking areas and premise entries of the sexually oriented business shall meet the requirements for parking under Article 8 of this Resolution and shall be illuminated from dusk to closing hours of operation with a lighting system

which provides an average maintained horizontal illumination of one (1.0) foot candle of light on the parking surface and/or walkways. This required lighting level is established in order to provide sufficient illumination of the parking areas and walkways serving the sexually oriented business for the personal safety of patrons and employees and to reduce the incidence of vandalism and criminal conduct. The lighting shall be shown on the required sketch or diagram of the premise.

6. Nothing contained in this Section of the Article shall relieve the operator(s) of a sexually oriented business from complying with other requirements of this Resolution as it may be amended from time to time, or any subsequently enacted resolutions.

1210. Hours of Operation.

1. No sexually oriented business may be open for business, permit any employee to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of 2:30 a.m. and 9:00 a.m. of any particular day.

1211. Prohibition of Distribution of Sexual Devices.

1. No sexually oriented business shall distribute, for commercial purposes, sell or offer for sale any device, instrument or paraphernalia designed or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of themselves or others.

2. Such devices, instruments or paraphernalia include but are not limited to: phallic shaped vibrators, dildo's, muzzles, whips, chains, bather restraints, racks, non-medical enema kits, body piercing implements (excluding earring or other decorative jewelry) or other tools of sado-masochistic abuse.

1212. Nudity at Sexually Oriented Businesses Prohibited.

1. Public nudity is prohibited within Union Township, including any sexually oriented business. Any sexually oriented business which is found in violation of this Section shall have its permit revoked.

1213. Definitions.

For the purposes of this Article, certain terms and words are defined as follows:

1. Sexually Oriented Businesses are those businesses defined as follows:

   a. Adult Arcade means an establishment where, for any form of consideration, one or more still or motion picture projectors, slide projectors or similar machines, or other image producing machines, for viewing by five or fewer persons each, are regularly used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

   b. Adult Bookstore, Adult Novelty Store or Adult Video Store means a commercial establishment which 50% or more of its stock-in-trade

or derives 50% or more of its revenues or 50% or more of its interior business or advertising to the sale, rental for any form of consideration, of any one or more of the following:

(1) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction of specified sexual activities or specified anatomical areas;

(2) instruments, devices, or paraphernalia which are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of themselves or others;

(3) an establishment may have other principal business purposes that do not involve the offering for sale, rental or viewing of materials depicting or describing specified sexual activities or specified anatomical areas, and still be categorized as adult bookstore, adult novelty store, or adult video store. Such other business purposes will not serve to exempt such establishments from being categorized as an adult bookstore, adult novelty store or adult video store so long as one of its principal business purposes is offering for sale or rental, for some form of consideration, the specified materials which depict or describe specified anatomical areas or specified sexual activities.

c. Adult Cabaret means a nightclub, bar, restaurant bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, in which persons appear in a state of nudity in the performance of their duties.

d. Adult Motel means a motel, hotel or similar commercial establishment which:

(1) offers public accommodations, for any form of consideration, which provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas and which advertises the availability of this sexually oriented type of material by means of a sign visible from the public right-of-way, or by means of any off-premises advertising including but not limited to, newspapers, magazines, pamphlets or leaflets, radio or television; or

(2) offers a sleeping room for rent for a period of time less than ten (10) hours; or

(3) allows a tenant or occupant to sub-rent the sleeping room for a time period of less than ten (10) hours.

e. Adult Motion Picture Theater means a commercial establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified

anatomical areas are regularly shown for any form of consideration.

f. Adult Theater means a theater, concert hall, auditorium, or similar commercial establishment which, for any form of consideration, regularly features persons who appear in a state of nudity or live performances which are characterized by exposure of specified anatomical areas or by specified sexual activities.

g. Escort means a person who, for any form of consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

h. Escort Agency means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip, or other consideration.

i. Massage Parlor means any place where, for any form of consideration or gratuity, massage, alcohol rub, administration of fomentations, electric or magnetic treatments, or any other treatment manipulation of the human body which occurs as a part of or in connection with specified sexual activities, or where any person providing such treatment, manipulation, or service related thereto, exposes his or her specified anatomical areas. The definition of sexually oriented businesses shall not include the practice of massage in any licensed hospital, nor by a licensed chiropractor or osteopath,

nor by any nurse or technician working under the supervision of a licensed physician, surgeon, chiropractor or osteopath, nor by trainers for any amateur, semiprofessional or professional athlete or athletic team or school athletic program.

j. Nude Model Studio means any place where a person, who regularly appears in a state of nudity or displays specified anatomical areas is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons.

k. Sexual Encounter Establishment means a business or commercial establishment, that as one of its primary business purposes, offers for any form of consideration, a place where two or more persons may congregate, associate, or consort for the purpose of specified sexual activities or the exposure of specified anatomical areas or activities when one or more of the persons is in a state of nudity or semi-nude. The definition of sexually oriented businesses shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the state engages in medically approved and recognized sexual therapy.

2. Employee means a person who works or performs in and/or for a sexually oriented business, regardless of whether or not said person is paid a salary, wage or other compensation by the operator of said business.

3. Establishment means and includes any of the following:

   a. The opening or commencement of any such business as a new business;

   b. The conversion of an existing business, whether or not a sexually oriented business, to any of the sexually oriented businesses defined in this Article;

   c. The addition of any of the sexually oriented businesses defined in this chapter to any other existing sexually oriented business; or

   d. The relocation of any such sexually oriented business.

4. Nudity or State of Nudity means the showing of either of the following:

   a. The human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;

   b. The female breast with less than a fully opaque covering on any part of the nipple.

5. Operator means and includes the owner, permit holder, custodian, manager, operator or person in charge of any permitted or licensed premises.

6. Permitted or Licensed Premises means any premises that requires a license and/or permit and that is classified as a sexually oriented business.

7. Person means an individual, proprietorship, partnership, corporation, association, or other legal entity.

8. Public Building means any building owned, leased or held by the United States, the state, the county, the township, any special district, school district, or any other agency or political subdivision of the state or the United States, which building is used for governmental purposes.

9. Public Park or Recreation Area means public land which has been designated for park or recreational activities including but not limited to a park, playground, nature trails, swimming pool, reservoir, athletic field, basketball or tennis courts, pedestrian/bicycle paths, open space, wilderness areas, or similar public land within the Township which is under the control, operation, or management of the Township Board of Trustees, the County Commissioners, or another public agency or entity.

10. Religious Institution means any church, synagogue, mosque, temple or building which is used primarily for religious worship and related religious activities.

11. Residential District or Use means a single family, duplex, townhouse, multiple family, or mobile park or subdivision and campground as defined in the Union Township Zoning Resolution.

12. School means any public or private educational facility including but not limited to child day care facilities, nursery schools, preschools, ballet or gymnastics academies or facilities, kindergartens, elementary schools, primary schools, intermediate schools, junior high schools, middle schools, high schools, vocational schools, secondary schools, continuation schools, special education schools, junior colleges, and universities.

School includes the school grounds, but does not include the facilities used primarily for another purpose and only incidentally as a school.

13. Semi-Nude means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

14. Sexually Oriented Business means an adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theatre, massage parlor, sexual encounter establishment, escort agency or nude model studio.

15. Specified Anatomical Areas means and includes any of the following:

    a. Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areolae; or

    b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

16. Specified Sexual Activities means and includes any of the following:

    a. The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts;

    b. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

    c. Masturbation, actual or simulated;

d. Human genitals in a state of sexual stimulation, arousal or tumescence;

e. Excretory functions as part of or in connection with any of the activities set forth in subdivisions (a) through (d) of this subsection.

17. Substantial Enlargement of a Sexually Oriented Business means increase in the floor areas occupied by the business by more than 15%, as the floor areas exist on the effective date of this Article.

18. Transfer of Ownership or Control of a Sexually Oriented Business means and includes any of the following:

a. The sale, lease or sublease of the business;

b. The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange or similar means;

c. The establishment of a trust, gift or other similar legal devise which transfers ownership or control of the business, except for the transfer by bequest or other operation of law upon the death of a person possessing the ownership or control.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEJA VU OF CINCINNATI, L.L.C., 516 Batavia Pike Mt. Carmel, Ohio 45244 Plaintiff, v. THE UNION TOWNSHIP BOARD OF TRUSTEES, 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 KENNETH GEIS, in his official capacity only as Administrator of Union Township 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 and UNION TOWNSHIP POLICE DEPARTMENT, a division of the Public Safety Department of Union Township, Ohio 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 Defendants.	CASE NO: C-1-99 726 JUDGE L. BECKWITH VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Sep. 9, 1999)

Now comes Plaintiff, Deja Vu of Cincinnati, L.L.C., who for its complaint against defendants, states as follows:

PRELIMINARY STATEMENT

1. This is an action under the laws and Constitution of the United States alleging that Union Township, Clermont County, by and through its Board of Trustees, its Township Administrator and its Police Department, in its enforcement capacity, seeks to impose an impermissible and unconstitutional prior restraint on the presentation of non-obscene adult-oriented forms of expression presumptively protected by the First Amendment to the United States Constitution and Article I, Sections 1, 2, 10, 11 and 14 and Article II, Section 28 of the Ohio Constitution by, among other things, enacting a resolution requiring the licensing of adult cabarets. By this complaint, Plaintiff challenges the constitutionality of that resolution on its face and as will be applied to Plaintiff.

JURISDICTION

2. Jurisdiction is conferred by 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 2201, 28 U.S.C. § 2202, 42 U.S.C. § 1983, and 42 U.S.C. § 1988. This Court may exercise pendent jurisdiction over the Plaintiff's state law claims on the basis of 28 U.S.C. § 1367.

3. This suit is authorized by law to redress deprivations under color of state law of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the United States Constitution and for declaratory and injunctive relief.

4. Venue in this Court is appropriate as the various acts complained of occurred within the Western Division of the Southern District of Ohio.

PARTIES

5. Plaintiff, Deja Vu of Cincinnati, L.L.C., is a Limited Liability Company duly organized under the laws of the State of Nevada and authorized and qualified to do business in the State of Ohio. Plaintiff is the tenant under a lease of an improved single story structure (hereinafter "the premises") located at 516 Batavia Pike, in Union Township, Clermont County, Ohio. Plaintiff is operating on these premises, "Deja Vu," a cabaret-style night club that features adult entertainment.

6. Defendant, Union Township Board of Trustees, is the duly elected law-making authority of Union Township.

7. Defendant, Kenneth Geis, is and was at all times referred to herein the administrator of Union Township, Clermont County. He is sued only in his official capacity for enforcing the regulations and laws of Union Township, Clermont County, and the laws of the State of Ohio and the United States.

8. Defendant, Union Township Police Department, is a division of the Public Department of Union Township, Ohio, organized under the laws of the State of Ohio and duly authorized to carry out law enforcement functions. It is being sued only in its official capacity for enforcing the regulations and laws of Union Township, Clermont County, and the laws of the State of Ohio and the United States.

STATEMENT OF THE CASE

9. Deja Vu opened to the public as a cabaret-style nightclub featuring adult-oriented entertainment on April 1, 1999 and continued the adult entertainment which

had been in operation at its premises since December of 1995. Deja Vu has been operating continuously.

10. To the best of Plaintiff's belief, Plaintiff has been and remains in full compliance with all valid ordinances and statutes affecting its property and the operation of its business featuring adult-oriented entertainment.

11. Commencing sometime prior to the public opening of Deja Vu and continuing to the present, Defendant Union Township has sought and is attempting to impose a prior restraint on constitutionally-protected forms of expression by establishing a system of regulating adult cabaret nightclubs, the specific purpose of which is to close Deja Vu and to prevent the opening and operation of similar adult-oriented businesses within Union Township.

12. In an attempt to zone out and close Plaintiffs business and thereby prevent it, and all other adult cabarets, from, presenting constitutionally-protected dance performances, Defendant Union Township Board of Trustees has enacted a resolution pursuant to Ohio Rev. Code §§ 503.51 to 503.59 to regulate and license adults cabarets within the unincorporated territory of Union Township. Resolution 99-15 (hereinafter "the Resolution"), a copy of which is attached hereto and marked as Exhibit A, will go into effect on September 9, 1999, regulates adult cabarets and establishes a system of permits and licenses for such establishments and their employees within Union Township.

State Enabling Legislation

13. Ohio Rev. Code §§ 503.51 *et seq.* were enacted by the Ohio General Assembly in June 1993 to grant townships in the State of Ohio the limited authority to enact

laws regulating adult cabarets. See attached Exhibit B.

14. Ohio Rev. Code § 503.53(B)(4) provides that if a township enacts, pursuant to the enabling legislation, any regulations governing adult cabarets, it shall be unlawful for any person to operate an adult cabaret without first having obtained a license from the township trustees. This section further makes it unlawful for any person to establish or operate an adult cabaret "within five hundred feet from the boundaries of a parcel of real estate having situated on it a school, church, library, public playground or township park."

15. Ohio Rev. Code § 503.55(C) expressly prohibits any township which has enacted regulations governing adult cabarets from granting a license to operate an adult cabaret to any applicant who, *inter alia*, lists a person on its application form who has been convicted of violating any provision of Chapter 2907 of the Revised Code, who has violated Ohio Rev. Code § 503.53 or who has had a liquor license revoked by the Liquor Control Commission. This section further authorizes the denial or revocation of adult cabaret licenses for a "failure to cooperate" with any required health and safety inspection.

16. Pursuant to Ohio Rev. Code § 503.57, the township may revoke an adult cabaret license if it determines that any prohibited act has occurred. The revocation may be accomplished without prior notice to the license holder and without providing the license holder with an opportunity to be heard. This section further provides that the only remedy open to one affected by the denial or revocation of an adult cabaret license is an appeal pursuant to Chapter 2506 of the Ohio Revised Code.

Union Township's Adult Cabaret Resolution

17. The Resolution of the Board of Trustees of Union Township regulating adult cabarets within the unincorporated area of the township, and the owners, operators, persons in charge, and employees of such establishments will become law on September 9, 1999. It requires persons to obtain a permit issued by the Board of Trustees of Union Township before operating or being employed in an adult cabaret presenting constitutionally-protected dance performances.

18. Section (D) of the Resolution sets forth the procedures persons must undertake to obtain an adult cabaret license. Specifically, persons desiring to operate an adult cabaret must make an application to the Board of Trustees indicating their name, residential address, date of birth, and social security number. Business entities must provide the same information for all officers, partners (limited and general), directors, and shareholders holding more than two percent (2%) of the shares of the stock of the corporation. Applicants must also include the same information for each person employed by the adult cabaret or whose employment is contemplated by the establishment, including the capacity in which the person is or is to be employed. All persons applying for a license must authorize the township to conduct general investigations into the background, and *subsequent investigations* to supplement or update the information, for the applicant and all persons named in the application.

19. Upon receipt of an application for a permit or renewal permit to operate an adult cabaret, Section (E) of the Resolution requires the Clerk to refer the applicant to the township police department to be fingerprinted and to notify the chief of that department to conduct investigations into the background of the applicant and, in the case of a permit application, into the

backgrounds of the other persons named in the application. After completing these investigations, the chief must compose a written report of the result and filed that report with the Township Clerk. The written report becomes part of the application. However, no section of the Resolution delineates the time period in which such investigations must be completed or the manner in which the information obtained will be used.

20. Section (F)(2)(a)-(g) of the Resolution sets forth the grounds on which an adult cabaret license application may be denied or not renewed. Specifically, the Board of Trustees of Union Township may deny or refuse to renew a license if:

    i. The Board determines, at its discretion, that the application is incomplete, contains any false information, or fails to comply with these regulations;

    ii. The applicant is a limited partnership, corporation, or other entity that is not in good standing in the jurisdiction where organized or is not authorized to do business in Ohio;

    iii. The operation of an adult cabaret at the specified premises would violate existing zoning restrictions, with no provision made to accommodate nonconforming uses;

    iv. The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret within the past five years has been convicted of or pleaded guilty to an offense under Ohio Revised Code Chapter 2907 or a substantially equivalent offense under a municipal ordinance in Ohio, or under the laws of another state or territory or of the United States, or under a municipal ordinance in any such jurisdiction;

v. The applicant or any person named in the application for an initial or renewal permit to operate an adult cabaret or any person employed at the adult cabaret, has *ever* been convicted of or pleaded guilty to a violation of Ohio Revised Code section 503.53(C); and

vi. The applicant has violated Union Township's regulations pertaining to adult cabarets.

21. No section of the Resolution provides the criteria under which an adult cabaret license must be granted.

22. Section (L)(1) of the Resolution authorizes Union Township personnel or agents "at all reasonable times" to inspect the permit premises to insure continued compliance with the laws of Ohio and these regulations.

23. Section (L)(2) of the Resolution authorizes Union Township personnel or agents "at any time there is reasonable cause to do so" to conduct a background investigation of any permittee, person named in the permit application or employee of the permittee. The results of these background investigations are to be complied [sic] as a written report which is filed with the Township Clerk. No section of the Resolution indicates how and for what purpose the results of, or the written report concerning, the background checks may be utilized.

24. Section (M)(1) of the Resolution requires adult cabarets to close no later than Midnight and to open no earlier than noon. However, adult cabarets serving alcohol pursuant to a state permit my [sic] remain open until 2:30 a.m. and other sexually-oriented businesses, such as bookstores, may remain open until 2:30 a.m.

25. Section (M)(2) of the Resolution requires the owner, operator or person in charge of an adult cabaret to allow state or local authorities, including police officers, access to any and all parts of the premises for purposes of making health or safety inspections. This section also requires such persons to cooperate with any background investigation.

26. Persons aggrieved by the ultimate decision of the Board of Trustees to deny, revoke, or not renew their adult cabaret licenses can only appeal the decision pursuant to Chapter 2506 of the Ohio Revised Code.

STATEMENT OF THE CLAIM

COUNT ONE

27. Paragraphs one through twenty-six are realleged as if fully rewritten.

28. Ohio Rev. Code §§ 503.51 *et seq.* and the Resolution are unconstitutional on their face under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I §§ 1, 2, 10, 11, 14, and Article II § 28 of the Ohio Constitution for the following reasons:

    i. Resolution requires a complete application to include the full name, residential address, date of birth, and social security number of all of the following persons: the applicant, the person applying on behalf of a partnership, corporation, or other entity, each partner, each shareholder holding more than two percent (2%) of the applicant's stock, and each person employed by the adult cabaret whose employment is contemplated by the establishment. This requirement violates the First and Fourteenth Amendments to the United States Constitution and the related right to privacy and

anonymity. The Resolution fails to set forth either the substantial governmental interest in this information or the substantial relationship between the governmental interest and the information required to be disclosed.

ii. The Resolution requires that the names of all persons employed by or otherwise associated with the entity applying for an adult cabaret permit be listed on the application and that those persons submit to criminal and background checks even though such persons are not responsible for the day-to-day operation or management decisions of the business. This requirement serves no legitimate governmental purpose in that the Resolution makes no provision for the use of such background checks in the consideration of the permit application.

iii. The Resolution restrains constitutionally-protected speech by including criminal disability provisions that allow the application to be denied if any person listed in the application has been convicted of any crimes listed in Ohio Revised Code Chapter 2907 within the past five years or convicted of any crimes listed in Ohio Rev. Code § 503.53 at any time in the past. By this provision, the Resolution unconstitutionally uses prior crimes and misconduct to prohibit the exercise of future First Amendment rights.

iv. The Resolution authorizes the revocation of any adult-cabaret permit on the basis of strict liability resulting from offending conduct by the permittee's employee regardless of whether the conduct occurred on the permit premises and regardless of whether the permittee was aware of and/or condoned the activity. This failure to afford

the permittee due process violates the Fourteenth Amendment to the United States Constitution.

v. The Resolution provides that applications are automatically denied to businesses that are not in compliance with existing zoning laws. In so doing, the Resolution conflicts with state law regarding the continuation of nonconforming uses and constitutes an unlawful taken of property in violation of the United States and Ohio Constitutions.

vi. The Resolution imposes strict liability against the permittee if its employees touch themselves and others regardless of whether such touching is knowing or intentional.

vii. The Resolution imposes hours of operation regulations that are not reasonably related to any substantial governmental purpose and which violate the Equal Protection Clause of the Fourteenth Amendment.

viii. The Resolution fails to provide any guidelines for searches of the premises and individuals' backgrounds and thereby establishes a system of continuing, general, and warrantless searches in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. Moreover, failure to cooperate in searches of the premises or background checks is terms for revocation of the permit.

ix. The Resolution itself does not provide any means of judicial review where there is a denial for an application of a permit other than by reference to Ohio Rev. Code § 2506 which statute has been previously held not to provide prompt judicial review.

29. Each of the aforementioned is being implemented to cause Plaintiff to cease presenting or conducting expressive conduct that is presumptively protected by the First and Fourteenth Amendments.

30. Plaintiff therefore is entitled to a declaration that the laws are unconstitutional on their face.

COUNT TWO

31. Paragraphs on [sic] through thirty are realleged as if fully rewritten.

32. Ohio Revised Code §§ 503.51 et seq. and the Resolution are unconstitutional as to be applied to Plaintiff under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 10, 11, 14 and Article II § 28 of the Ohio Constitution for the following reasons:

    i. The laws deprive and threaten to deprive Plaintiff of its rights to engage in expressive activity and to be free from prior restraint;

    ii. The laws deprive and threaten to deprive Plaintiff of his rights to be treated equally and to be free from irrational, arbitrary, and capricious laws;

    iii. The laws deprive and threaten to deprive Plaintiff of his rights to be free from unreasonable searches and seizures and compelled self-incrimination; and

    iv. The laws deprive and threaten to deprive Plaintiff of its right to be afforded due process of law and to be free from retroactive laws.

33. Plaintiff is therefore entitled to a declaration that the laws are unconstitutional as applied.

COUNT THREE

34. Paragraphs one through thirty-three are realleged as if fully rewritten.

35. Ohio Rev. Code §§ 503.51 et seq. and the Resolution deprive and threaten to deprive Plaintiff of its rights guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 10, 11, and 14 and Article II, § 28 of the Ohio Constitution to engage in expressive activity and to be free from prior restraints, to be treated equally, and to be free from irrational, arbitrary, and capricious laws, to be free from unreasonable searches and seizures and compelled self-incrimination; to be afforded due process of law and to be free from retroactive laws, all of which has caused or threatens to cause in the future irreparable harm to Plaintiff for which there is no adequate remedy at law.

36. By reason of Defendants' conduct and threatened conduct and the irreparable harm Plaintiff has suffered and will continue to suffer, Plaintiff is entitled to a preliminary injunction and after hearing a permanent injunction demanded hereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants, and each of them as follows:

1. A declaration that Union Township Resolution 99-15 is unconstitutional on its face and as will be applied to Plaintiff in violation of the First and Fourteenth Amendments;

2. A temporary order restraining Defendants, including their officers, agents, employees, representative, and

all person [sic] acting by, through, and for them, from enforcing, applying, and implementing Resolution 99-15;

3. An award of Plaintiffs reasonable attorneys' fees and costs incurred herein pursuant to 42 U.S.C. § 1988;

4. An award of such other relief in law and equity that this Court deems just and proper under the premises.

Respectfully submitted,

SIRKIN, PINALES, MEZIBOV
& SCHWARTZ

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEJA VU OF CINCINNATI, L.L.C.,
516 Batavia Pike
Mt. Carmel, Ohio 45244

Plaintiff,

v.

THE UNION TOWNSHIP BOARD OF TRUSTEES,
4312 Gleneste-Withamsville Road
Cincinnati, Ohio 45245

KENNETH GEIS, in his capacity only as Administrator of Union Township
4312 Gleneste-Withamsville Road
Cincinnati, Ohio 45245

and

UNION TOWNSHIP POLICE DEPARTMENT, a division of the Public Safety Department of Union Township, Ohio
4312 Gleneste-Withamsville Road
Cincinnati, Ohio 45245

Defendants.

CASE NO:
JUDGE

VERIFICATION

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

Jason Garvey, being duly sworn, deposes and states that he resides in Clermont County Ohio; that he is general manager of "Deja Vu"; and that he has read the

foregoing Complaint and knows the contents thereof that the same, with respect to each averment concerning Deja Vu, is true to the best of his knowledge except as to those matters stated to be alleged on information and belief; and that as to those matters be believes them to be true.

Dated: September 9th, 1999 /s/ Jason K. Garvey
Jason Garvey

Subscribed and sworn to before me by Jason Garvey, on this 9th day of September, 1999.

/s/ H.L. Sirkin
Notary Public
_____ County, Ohio
My Commission Expires: _____

[SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEJA VU OF CINCINNATI, L.L.C., 516 Batavia Pike Mt. Carmel, Ohio 45244 Plaintiff, v. THE UNION TOWNSHIP BOARD OF TRUSTEES, 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 KENNETH GEIS, in his official capacity only as Administrator of Union Township 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 and UNION TOWNSHIP POLICE DEPARTMENT, a division of the Public Safety Department of Union Township, Ohio 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 Defendants.	CASE NO. C-1-99-726 (Judge Beckwith Magistrate Judge Hogan)

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AFFIDAVIT OF JANE ROE II

JANE ROE II, under penalties of perjury under the laws of the State of Ohio, declares as follows:

1. I am a female, twenty-seven (27) years of age, and a resident of the State of Ohio.

2. My occupation is that of an exotic dancer. I currently perform at the Deja Vu club in Union Township, Ohio ("Deja Vu"). I have performed as an exotic dancer since 1995, starting in the State of Tennessee and now in the State of Ohio. I am a divorced mother of two children.

3. In April of 1997, I was convicted of violating Memphis Municipal Ordinance §4.82, which is entitled "Prohibited Sexual or Pornographic Conduct." I was required

to pay a fine of $140.00 because of this conviction. This conviction arose because of a table dance I performed for a customer, where an undercover police officer alleged that during the course of the dance, I made some improper contact with the customer. Since the time of this incident in April of 1997, I have never been convicted of any other crime relating to my performance at an adult establishment.

4. It is my understanding that my conviction in Memphis is a "substantially equivalent offense" to the criminal prohibitions as set forth in Ohio Revised Code Chapter 2907.

5. I perform at Deja Vu pursuant to the terms of a lease agreement, whereby I lease space from the club for the purposes of engaging in my professional entertainment activities. This is not unlike the circumstance in the beautician industry, where many beauticians operate according to a "chair lease agreement." I am not an "employee" of the Deja Vu club in any sense of the word. Regardless, it is my understanding that Union Township considers all exotic dance entertainers to be "employees" of "adult cabarets" for the purposes of Res. 99-15, and as a result, the Deja Vu club would be unable to obtain a permit pursuant to the Resolution if I continued to perform there.

6. I desire to be able to continue performing as an exotic dancer at Deja Vu, but it is my understanding that if my conviction would preclude Deja Vu from obtaining a permit pursuant to Res. 99-15, the club would be forced to terminate my lease so that it could obtain a permit in order to be able to continue to operate. In such a circumstance, I would be precluded from engaging it my performance dance entertainment activities in Union Township.

7. This Affidavit uses the name "Jane Roe II" to describe myself. An affidavit with my real name and signature has been submitted under seal to the Court.

Dated at Cincinnati, Ohio, this ___ day of July, 2000.

_____
JANE ROE II

Subscribed and sworn to before me this ___ day of July, 2000.

_____
_____, Notary Public
_____ County, Ohio
My Commission Expires: _____

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEJA VU OF CINCINNATI, L.L.C., 516 Batavia Pike Mt. Carmel, Ohio 45244 Plaintiff, v. THE UNION TOWNSHIP BOARD OF TRUSTEES, 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 KENNETH GEIS, in his official capacity only as Administrator of Union Township 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 and UNION TOWNSHIP POLICE DEPARTMENT, a division of the Public Safety Department of Union Township, Ohio 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 Defendants.	CASE NO. C-1-99-726 (Judge Beckwith Magistrate Judge Hogan)

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AFFIDAVIT OF JOHN DOE I

JOHN DOE I, under penalty of perjury under the laws of the State of Ohio, declares as follows:

1. I am a resident of Ingham County, Michigan, and I own more than two percent (2%) of the ownership interest of Deja Vu of Cincinnati, L.L.C. ("Deja Vu"). As the name implies, Deja Vu is a limited liability company. Because of Union Township Resolution 99-15 ("Res. 99-15"), and particularly §D(5)(E), Deja Vu is required to disclose my full name, residential address, date of birth, and social security number on its permit application.

2. It is my understanding that the information that is contained in Deja Vu's application for permit pursuant

to the requirements of Res. 99-15 – which would include my name, residential address, date of birth, and social security number – would be matters of public record that were accessible to any member of the general public pursuant to the provisions of the Ohio Public Records Act.

3. I do not desire my name, residential address, date of birth, and social security number to appear in association with Deja Vu in any documents that could be accessible to members of the general public.

4. In certain areas of the country, including the greater Cincinnati area, adult entertainment is an extremely controversial topic. Often times, individuals associated with such businesses, such as myself, can be subject to public ridicule, scorn, threats, harassment, intimidation, and even violence. I have personally experienced such matters in the past in regard to my association with other "adult" entertainment facilities. I am further aware of the activities of certain anti-adult entertainment groups in the greater Cincinnati area, particularly in regard to the Deja Vu club, where they have picketed in front of this facility, taken photographs of customers and license plate numbers, and have endeavored to obtain information in regard to the owners of the vehicles in the parking lot for the purposes of publishing the names of these individuals in local newspapers and on computer websites. I believe that a forced disclosure of this highly personal information creates a serious and real risk to both myself and to my family of harassment, intimidation, and threats to our personal safety, and certainly violates our rights of privacy.

5. Because of the controversial nature of adult entertainment, and because of the experiences that I have discussed, individuals such as myself who are involved in the ownership and/or operation of adult entertainment

facilities do not make public certain private information, such as our residential addresses, telephone numbers, and social security numbers. We zealously guard the confidentiality of this information.

6. Res. 99-15, §D(5)(g), requires (it uses the word "shall") Deja Vu to submit along with its application for a permit, a statement that in regard to certain individuals associated with the business, including all owners who have more than a two percent (2%) ownership interest in the stock of an application corporation and each partner in a partnership, they have "never" been "convicted of or plead guilty to" an obscenity offense under Ohio Revised Code Chapter 2907 "or a substantially equivalent offense . . . under the laws of another state. . . ." In February of 1989, I was convicted in state court in Charlotte, North Carolina, of two counts of conspiracy to disseminate obscene material and two counts of being an accessory before the fact to the dissemination of obscene material. These charges and convictions related to the dissemination in Charlotte, North Carolina, of certain magazines and videotapes

7. Because of these convictions, it is impossible for Deja Vu to submit, along with its permit application, the statement required by Res. 99-15, §D(5)(g), since the representation (of no convictions) would be untrue. Without such a statement (which is impossible to provide because of my past convictions), Deja Vu's application would be "incomplete," and because of this, Deja Vu's application would be required to be denied pursuant to Res. 99-15, §F(2)(a).

8. In the eleven (11) years since these convictions in Charlotte, North Carolina, I have not been convicted of any other crime anywhere in the country. In fact, during that time, and irrespective of these 1989 criminal convictions in North Carolina, I applied for

and was issued a license to sell and dispense alcoholic beverages in connection with a sports bar of which I am the one hundred percent (100%) owner of the stock of the corporation.

9. This Affidavit uses the name "John Doe I" to describe myself. An affidavit with my real name and signature has been submitted under seal to the Court.

Dated at Lansing, Michigan, this ___ day of July, 2000.

_____
JOHN DOE I

Subscribed and sworn to before me this ___ day of July, 2000.

_____
_____, Notary Public
_____ County, Michigan
My Commission Expires: _____

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEJA VU OF CINCINNATI, L.L.C., 516 Batavia Pike Mt. Carmel, Ohio 45244 Plaintiff, v. THE UNION TOWNSHIP BOARD OF TRUSTEES, 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 KENNETH GEIS, in his official capacity only as administrator of Union Township 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 and UNION TOWNSHIP POLICE DEPARTMENT, a division of the Public Safety Department of Union Township, Ohio 4312 Gleneste-Withamsville Road Cincinnati, Ohio 45245 Defendants.	CASE NO. C-1-99-726 (Judge Beckwith Magistrate Judge Hogan)

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AFFIDAVIT OF JOHN DOE II

JOHN DOE II, under penalties of perjury under the laws of the State of Ohio, declares as follows:

1. I am forty-one (41) years of age, and I am a resident of the State of Ohio.

2. I am currently employed as a disc jockey (D.J.) at the club in Union Township, Ohio ("Deja Vu"). The primary duties of this position area to play the music that accompanies the dance performances, introduce the dance performances, and in general act as an "emcee" to insure the smooth operation of the club and to provide for the entertainment of the patrons therein.

3. I have been involved in being a D.J. of one sort or another since the age of sixteen (16), including stints as a D.J. on both college and commercial radio stations. On the weekends, I also am a D.J. at various parties, weddings, and other special events. Since these types of other events normally only occur on the weekends, I generally work four to five days during the week at Deja Vu, and it is this work that provides my principal source of income. I

have worked at Deja Vu for approximately 1½ years.

4. In 1992, I was convicted by a "no contest" plea of an obscenity offense and the crime charged was as I recall "calling attention to an obscene display." This incident resulted from a time that I worked as a D.J. at a regular (non-"adult") bar. The bar did not normally present adult entertainment. That night, however, it had a lingerie modeling show wherein women would wear and model lingerie, which could be purchased by customers. The women did not disrobe on stage and would go behind closed doors to change any garments. At no time did any person appear in a state of full nudity. I was given various cue cards to read to describe the outfits that each woman was wearing. I was not involved in writing the cue cards or setting up the show in any way. One of the women was wearing a neglige [sic] that was slightly see through. Reading the cue card, I informed the audience of this fact. After the show, undercover police officers arrested that model for indecent exposure and I was arrested and charged with the first degree misdemeanor of obscenity, specifically for "calling attention to an obscene display."

5. When this matter went to court, the Judge did not treat the matter very seriously, and though I was facing a year in jail and a significant fine, it seemed easier just to make a "no contest" plea and pay the fine. I made the plea and the Judge just gave me a $30.00 fine. I continued to work after this incident as a D.J. in various capacities, and never really gave a great deal of second thought to this unfortunate incident, as it did not seem to have any lingering importance in my life.

6. Because of the provisions of Union Township Resolution 99-15, §D(5)(g), however, neither I nor Deja Vu can state that I have "never" been convicted of one of the listed offenses. I desire to be able to continue to work as a D.J. at Deja Vu, but it is my understanding that if my conviction would preclude Deja Vu from obtaining a permit pursuant to Res. 99-15, the club would be forced to fire me so that it could obtain a permit in order to be able to continue to operate.

7. If I was forced to lose my job because of this ordinance provision, it would have a devastating economic effect on myself. In addition, I would be precluded from engaging in the musical entertainment activities that I have been conducting at Deja Vu.

8. While it is true that I have technically been convicted of an obscenity offense, I am sure that were I able to explain the circumstances of this offense to any reasonable person, they would not have any reason to believe that I should not be able to continue to work as a D.J. at Deja Vu, or that Deja Vu should be precluded from obtaining a permit to be able to operate its entertainment facility simply based upon my conviction. Unfortunately, the Resolution does not give me any opportunity to explain the circumstances behind the conviction.

9. This Affidavit uses the name "John Doe II" to describe myself. An Affidavit with my real name and signature has been submitted under seal to the Court.

Dated at Cincinnati, Ohio, this ___ day of July, 2000.

JOHN DOE II

Subscribed and sworn to before me this ___ day of July, 2000.

Notary Public

_____County, Ohio

My Commission Expires: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EXHIBIT D

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

AFFIDAVIT OF JASON GARVEY

Jason Garvey, being first duly sworn, deposes and says:

1. I am a current resident of Clermont County, and I am the general manager of the "Deja Vu" club located at 516 Batavia Pike, Cincinnati, Ohio, which is owned and operated by Deja Vu Cincinnati, L.L.C.

2. I have worked at various "Deja Vu" clubs across the country since March of 1995. I have worked at such establishments as an hourly employee, assistant manager, and manager in such diverse locations as Kalamazoo, Michigan, and Lansing, Michigan.

3. As the general manager of the Cincinnati Deja Vu club, and as manager and assistant manager of other Deja Vu clubs in the past, I am familiar with customer habits in visiting the facilities, income figures, trends, estimates, and projections, as well as how those figures change by the day of the week and the hour of the day. Specifically, given my experience, I am familiar with the days of the week and the times of the day that are most favorable for customer patronage of Deja Vu clubs.

4. The Cincinnati Deja Vu club opened on March 29, 1999, and continued the operation of an adult cabaret on the premises from a prior establishment that was known

as "Rumors." Since opening until the present, the club has been undergoing extensive renovations. From the time that the Deja Vu club opened up until approximately August 19, 1999, only twenty-five percent (25%) of the actual public areas of the club were open to the general public as a result of renovation activities. At present, approximately fifty percent (50%) of the club area is open to the general public, and it is estimated that the entire club facility will be open for use by mid-October, 1999. The figures set forth below are based upon actual revenue, customer, and dance figures generated while the club has been undergoing these renovation activities.

5. The club regularly maintains daily records of income generated, the number of customers frequenting the facility, and the number of personal dance performances (such as "table dances") sold by the entertainers to customers. Since we were made aware that Union Township was attempting to enact the hours of operation restrictions that ultimately were included in Resolution 99-15, I have been keeping track of these income, customer count, and dance figures segregated by whether they were generated during the hours of operation permitted by Resolution 99-15 (12:00 noon until 12:00 midnight) or during times when the club would have to be closed pursuant to the terms as contained in the Regulations attached to that Resolution.

6. The Cincinnati Deja Vu club is open for business Monday through Thursday, from between 12:00 p.m. until 2:00 am; on Friday, from between 12:00 p.m. until 4:00 am.; on Saturday from between 3:00 p.m. until 4:00 a.m.; and on Sunday from between 6:00 p.m. and 2:00 a.m. Setting aside the restrictions as contained in Resolution 99-15, it is our desire to continue to operate during those

times. Based upon my experience in working at other Deja Vu clubs, these are normal hours of operation for adult cabarets in general, and Deja Vu clubs in particular.

7. From the figures that I have put together in regard to the actual experience of the Cincinnati Deja Vu club, it is my opinion that if the club was required to comply with the hours of operation restrictions as contained in Union Township Resolution 99-15, the club would suffer a 29.5% reduction in its gross revenues; a 37% drop in performance dances sold; and a 20% reduction in customers coming into the facility. This would have a drastic and financially disastrous impact upon the club and may well preclude it from financially being able to operate.

8. Given my previous experience in management at other Deja Vu clubs and my experience in working at the Cincinnati Deja Vu club, I am aware that the most popular days of the week for customers to come in to the clubs are Fridays and Saturdays, and that the most popular time of the day for customers to visit are the late evening hours, and specifically between 10:00 p.m. and 3:00 a.m.

9. In my opinion, if the club was required to comply with the hours of operation restrictions as contained in the Regulations accompanying Resolution 99-15, the club would be closed during the times when customers are most likely to otherwise visit the facility.

10. The Cincinnati Deja Vu club, as is the case with most Deja Vu clubs, is a non-alcohol facility. Accordingly, there is a significant increase in customer patronage, particularly on Friday and Saturday nights, with the "after bar" crowd, whereby customers come to the club after the bars are required to close. Here, licensed alcohol

facilities are required to stop serving alcohol at 2:00 a.m., and must close their doors no later than 2:30 a.m.

11. Regardless of the "after bar" crowd, the normal experience in these clubs is that customers generally come into the facilities late in the evening. This is the regularly observed customer experience in this industry.

12. Because of all of the above, it is my opinion that if the Cincinnati Deja Vu club was required to comply with the hours of operation restrictions as contained in the Regulations established through Resolution 99-15, the customers who would normally come into the facility after the closing hours set forth in the Regulation, and the income that was generated therefrom, and the dances that the customers would normally purchase, would not be recaptured by the club by customers merely coming into the club earlier in the evening. My experience leads me to conclude that the club would simply lose most of these individuals as customers as well as the income that would otherwise be earned from them.

13. Most of the standard business expenses of the club (such as rent, insurance, etc.) are fixed, and would not be affected by the closing hours restrictions as contained in the Regulations. The club would have to incur those expenses regardless of how many hours of the day it was open for business. Electricity savings would be minimal. The only significant expenditure that would be variable based on the hours that the club was open would be the salaries of the employees. However, even that is minimal. The entertainers who perform at the club are not employees, but are actually tenants who pay rent; not unlike the circumstance of a beautician who has a "chair leasing agreement" with a salon. These entertainers perform

pursuant to the terms of a "Dancer Performance Lease", and this business arrangement has been upheld by numerous courts in reported decisions. In addition, management staff are salaried employees, and their income is not dependent on the number of hours that the club is open. Actual hourly employees would be waitresses, disc jockeys, doormen, and "floor walkers." On any given evening, there are approximately 6 – 10 of these employees working at the facility. The savings of these salaries by way of the hours of operation restrictions as contained in the Regulations would not, however, in any manner increase the profitability of the club. Any savings of these wages and any other variable expenses would not off-set the significant and disastrous reduction of income that would result if the club was required to comply with the hours of operation restrictions as contained in the Regulations.

FURTHER AFFIANT SAITH NOT.

Dated: September 9th, 1999 /s/ Jason K. Garvey
Jason Garvey

Subscribed and sworn to before me by Jason Garvey, on this 9th day of September, 1999.

/s/ H.L. Sirkin
Notary Public
_____ County, Ohio
My Commission Expires: _____

[SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEJA VU OF CINCINNATI, L.L.C.,	:	
Plaintiff	:	CASE NO.
vs.	:	C-1-99-726
THE UNION TOWNSHIP BOARD OF TRUSTEES, et al.,	:	(J. Beckwith)
Defendants	:	

AFFIDAVIT OF KENNETH GEIS

Comes now the affiant, Kenneth Geis, and being first duly cautioned and sworn, deposes and states the following based upon personal knowledge:

1. I am currently the administrator of Union Township and have held that position since March, 1994.

2. On August 30, 1995, the Union Township zoning director at the time, Lois Ellison, attended a seminar entitled: "Sexually Oriented Businesses, Developing a Local Ordinance and Implementation Strategy." During the course of the seminar, Ellison was provided with sample legislation and a great deal of resource information regarding harmful secondary effects of sexually oriented businesses. Attached hereto as collective **Exhibit A** are studies which Ellis received at the seminar regarding the harmful secondary effects of sexually oriented businesses. Those include studies prepared for the City of Garden Grove, California; Los Angeles, California; Indianapolis, Indiana; Minneapolis, Minnesota; Cleveland, Ohio; Oklahoma City, Oklahoma: Austin, Texas; Beaumont, Texas;

Houston, Texas; Phoenix, Arizona; Seattle, Washington; Amarillo, Texas, and Whittier, California.

3. After Ellison returned from the seminar, we met and discussed the information which she had received. I then reviewed the reports included in Exhibit A regarding the harmful secondary effects of sexually oriented businesses. As I reviewed those reports, it became clear to me that as a matter of good government, Union Township should develop legislation to regulate sexually oriented businesses including adult cabaret in order to minimize the well-documented harmful secondary effects of such businesses. In September, 1995, I asked Lois Ellison to begin preparing legislation to zone areas specifically for sexually oriented businesses.

4. In early November, 1995, at the direction of the Township Trustees, I began to review the procedures associated with adopting legislation to regulate and permit sexually oriented businesses. On November 23, 1995, notices were sent out regarding public hearings for the purpose of establishing rules and regulations for adult cabarets and massage parlors. On December 9, 1995, the adult cabaret, Rumors, opened. The first public hearing was conducted December 12, 1995, and a second public hearing was conducted December 26, 1995, regarding adult cabarets and massage parlors. Attached hereto as **Exhibit B** is a transcript from the December 12, 1995, public meeting. Attached hereto as **Exhibit C** is a transcript of the December 26, 1995 public hearing. I was present at both public hearings and have reviewed the transcripts which are attached. To the best of my recollection, the transcripts accurately reflect what took place at each of the meetings. The overwhelming majority of the

citizens who spoke at these public meetings were in favor of legislation regulating sexually oriented businesses.

5. As the transcripts reflect, the intent of the legislation which was ultimately enacted was not to prohibit Rumors from operating or to even make the operation of a sexually oriented business more difficult. The objective of the legislation was to insure that proper safeguards were in place in order to minimize the harmful secondary effect of sexually oriented businesses. For example, it was required that any sexually oriented business submit a list of employees with authorizations to conduct background checks. This was required so that Union Township could insure that individuals with convictions for sexual offenses were not permitted to work at the adult cabarets. This was to protect individuals within the adult cabarets such as the young, female dancers and customers as well as individuals in the surrounding community. In addition, the information could be used to screen out individuals under 18 years of age.

6. I drafted the legislation which was ultimately voted into effect (Resolution No. 95-21) with the help of David Frey of the Clermont County Prosecutor's Office. Both David Frey and I were familiar with the enabling legislation contained with ORC §503.51, et seq as well as the studies referred to in Exhibit A. In addition, both David Frey and I had read the cases of ***Cleveland PM on the Board Walk v. City of Cleveland*** and ***Avenue Grille, Inc. v. Rootstown Township*** as well as the information contained within the various studies. The purpose of enacting the legislation was solely to attempt to limit the harmful secondary effects of any sexually oriented business which began operations in Union Township. The legislation does not

make any attempt to regulate the content of any expression.

7. The legislation went in effect January 26, 1996. Shortly before the resolution went into effect, on January 25, 1996, Old 74 Corporation, dba Rumors filed a complaint for a preliminary injunction.

8. While Rumors was in operation, there was serious criminal activity in the cabaret. There were numerous liquor law violations associated with the operation of the establishment. In addition, a dancer and a patron were charged with prostitution related offenses. Another person was charged with abduction, gross sexual imposition and felonious sexual penetration for actions which occurred inside the cabaret. That individual pled guilty to aggravated menacing, unlawful restraint, and sexual imposition. A police officer attempting to effect an arrest of an intoxicated patron was seriously assaulted. That patron pled guilty to assault, resisting arrest, and DUI.

9. Judge Spiegel granted a preliminary injunction in favor of Old 74 Corporation, dba Rumors and ruled that Resolution 95-21 was unconstitutional. That ruling was affirmed by the United States Court of Appeals for the Sixth Circuit. Following that ruling, at the direction of the Trustees, I began work on amending the adult cabaret ordinance to comply with those decisions.

10. Eventually, Resolution 99-15 amending the previous adult cabaret ordinance was passed on August 10, 1999, to go into effect September 9, 1999. Between the time the former adult cabaret ordinance was ruled unconstitutional and the enactment of Resolution 99-15, Deja Vu began operating at the location where Rumors had previously operated.

11. I participated in drafting Resolution 99-15 with the advice of counsel and at the direction of the Board of Trustees. I again reviewed the studies attached to this Affidavit as Exhibit A regarding the harmful secondary effects of sexually oriented businesses. I discussed those studies with the Board of Trustees and made them aware of the findings of the studies set forth in paragraph (B) of Resolution 99-15.

12. The closing time of Midnight was included in an effort to insure the adult cabaret would close before the closing time of the bars and taverns in the area. There was concern that during the hours after Midnignt there was a greater chance that intoxicated male patrons would cause a danger to themselves and to the employees of the adult cabarets and would cause increased criminal activity in the surrounding neighborhood. The provisions prohibiting people with convictions for certain crimes from owning, operating or being employed by adult cabarets was included for the reasons set forth in paragraph 5 of this Affidavit.

Further affiant sayeth naught.

/s/ Kenneth Geis
Kenneth Geis

Sworn to and subscribed before me, a Notary Public, this 1st day of October, 1999, by Kenneth Geis.

/s/ Martha Brown
Notary Public

MARTHA ANN BROWN
Notary Public, State of Ohio
My Commission Expires August 1, 2000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was ~~mailed~~ hand delivered this 6th day of October, 1999, to:

H. Louis Sirkin, Esq.
Sirkin, Finales, Mezibov & Schwartz
920 Fourth & Race Streets
105 West Fourth Street
Cincinnati, OH 45202
& mailed to:

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Attorneys for Plaintiff

/s/ L.E. Barbiere
Lawrence E. Barbiere

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., and HIGHLAND BOOKS, INC., Plaintiffs, v. CITY OF LOS ANGELES, Defendant.	Case No. CV 95-07771 DDP (CTx) **ORDER** [Motions filed on 2/4/05] (Filed Jun. 10, 2005)

In this matter the owners of two adult bookstores, Alameda Books, Inc., and Highland Books, Inc., sue the City of Los Angeles, to enjoin the enforcement of an ordinance, which they claim unlawfully abridges their First Amendment right to free speech. The ordinance, enacted by the Los Angeles City Council in order to reduce criminal activity indirectly associated with the operation of adult businesses, prohibits the combined operation of multiple types of sexually explicit commerce "in the same building, structure or portion thereof." Los Angeles Mun. Code § 12.70(C).

Applying the standard elucidated by the Supreme Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court previously found that § 12.70(C) was a content based regulation of speech that failed strict scrutiny and therefore violated the First Amendment. Accordingly, the Court granted summary judgment to the business owners. The Ninth Circuit affirmed this order, albeit on different grounds. *Alameda Books v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000). It held that, even if the ordinance was content neutral, the City failed to demonstrate through its reliance on a study of the effects

of concentrations of adult businesses that the regulation was designed to serve a substantial government interest.

A divided Supreme Court reversed. While no opinion carrying a clear majority, five justices agreed that the City had satisfied its initial evidentiary burden and demonstrated that its ban on multiple-use adult establishments serves its interest in reducing crime. *City of Los Angeles v. Alameda Books*, 535 U.S. 612 (2002). The Court then remanded this case for further proceedings in light of its elaboration of the *Renton* standard. Upon remand, the City and the business owners stipulated to defer further proceedings while the Ninth Circuit resolved three cases then pending that required it to apply the Supreme Court's holding in *Alameda Books*. On September 27, 2004, the Ninth Circuit decided the last of these three cases. The parties now move this Court to rule on certain preliminary issues arising from the *Alameda Books* holding in order to properly frame the remaining issues and guide discovery.

I. Background

A. Factual Background

In 1978, the City of Los Angeles enacted an ordinance, Los Angeles Municipal Code § 12.70(C), which prohibits adult entertainment establishments within 1,000 feet of each other or within 500 feet of a religious institution, school or public park. In enacting this law, the Los Angeles City Council relied on a 1977 study carried out by the Department of City Planning concluding that concentrations of adult entertainment establishments are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. *See* Los Angeles Dept.

of City Planning, City Plan Case No. 26475, City Council File No. 74-4521-S.3, *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* (June 1977). Although there is some evidence that the intent of the City Council was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct types of commercial trades operating under common ownership and housed within a single structure, the ordinance that the City enacted directed that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line . . . from the closest exterior structural wall of each business." Los Angeles Mun. Code § 12.70(D) (1978).

Subsequent to enactment, the City realized that this method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure. Apparently concerned that allowing an adult oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the City Council amended § 12.70(C) to prohibit "the establishment or maintenance of more than one adult entertainment business in the same building, structure, or portion thereof." Los Angeles Mun. Code § 12.70(C) (1983). The amended ordinance defines an "adult entertainment business" as an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters, and notes that each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." Los Angeles Mun. Code § 12.70(B)(17). Thus, the ordinance uses the term "business" to refer to the commerce of a particular type of good or service sold in adult establishments, rather than

the establishment itself. Relevant for the purposes of this case are the ordinance's definitions of adult bookstores and arcades. An adult bookstore is an operation that "has a substantial portion of its stock-in-trade and offers for sale" printed matter and videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(2)(a). An adult arcade is an operation where, "for any form of consideration," five or fewer patrons together may view films or videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(1).

Alameda Books, Inc., ("Alameda") and Highland Books, Inc., ("Highland") are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or within 500 feet of any religious institution, public park, or school. Both establishments rent and sell sexually oriented products, including videocassettes. Each purveyor operates its retail sales and rental operations in the same commercial space in which video booths are located. After a Los Angeles city inspector found in 1995 that Alameda was operating both as an adult bookstore and an adult arcade in violation of the City's adult zoning regulations, Alameda and Highland joined as plaintiffs and sued the City under 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent enforcement of the ordinance. The plaintiffs contend that the ordinance violates the First Amendment because it impedes on their fundamental right to freedom of speech.

B. Procedural Background

Early on, both the plaintiffs and the defendant filed cross-motions for summary judgment with respect to Count I of the plaintiffs' complaint, which alleges a facial

violation of the First Amendment. This Court initially denied both motions on this First Amendment issue, concluding that there was a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area. After the plaintiffs filed a motion for reconsideration, however, this Court found that the City's prohibition on multiple-use adult establishments was not a content neutral regulation of speech and subjected the ordinance to strict scrutiny.[1] The Court granted summary judgment for the plaintiffs because it found that the evidence offered by the City did not demonstrate that its prohibition was necessary to serve a compelling government interest.

The Court of Appeals for the Ninth Circuit affirmed, although on different grounds. The Ninth Circuit did not reach the question of whether the ordinance was content based or content neutral. It reasoned that, even if the ordinance was content neutral and therefore subject to intermediate scrutiny, the City failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments is "designed to serve" the City's substantial interest in reducing crime. Accordingly, the Ninth Circuit concluded that the challenged ordinance was invalid under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

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[1] This court reasoned that neither the City's 1977 study nor a report cited in *Hart Book Stores v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), supported a reasonable belief that multiple-use adult establishments produced the secondary effects the City asserted as its content neutral justification for the prohibition.

The Supreme Court granted certiorari to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*. With no opinion carrying a majority of the justices, it reversed. Justice O'Connor announced the judgment and delivered the plurality opinion, which applied *Renton* and found that the City could rely on its 1977 study to support the ordinance at the summary judgment stage. Justice Kennedy concurred in the plurality's judgment but he employed a distinct analytical approach. The remaining justices, led by Justice Souter, dissented.

On remand, a status conference was held pursuant to this Court's order requiring the parties to meet and confer on the issues remaining to be tried following the Supreme Court's decision. A joint status conference statement (Joint Statement") was filed on December 27, 2002. Following the status conference on January 6, 2003, the parties stipulated to defer discovery and briefing pending the decisions in three cases concerning the interpretation of *Alameda Books*, then before the Ninth Circuit. On January 22, 2003, this Court signed the stipulation, which provided that certain preliminary issues would be briefed by the parties following the decision by the Ninth Circuit in the last of the three pending cases.

On July 28, 2003, the Ninth Circuit decided two of the three cases, *Center for Fair Public Policy v. County of Maricopa*, Ninth Cir. No. 00-1658, *L.J. Concepts, Inc. v. City of Phoenix*, Ninth Cir. No. 00-19605, in a consolidated opinion reported *sub nom., Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003). On September 27, 2004, the Ninth Circuit filed its decision in the third case, *Dream Palace, Inc. v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004).

The Joint Statement and Stipulation asks the Court to rule on four preliminary matters in order to properly frame the issues to be tried and to guide discovery. (Stipulation at 3.) The first issue is to determine the holding of *Alameda Books*, specifically whether Justice Kennedy's concurrence in *Alameda Books* changed the standard established by the Supreme Court in *Renton* for evaluating the constitutionality of laws regulating sexually explicit adult businesses. Joint Statement at 2-3.) The second issue involves the determination of the scope and parameters of the plaintiffs' burden to cast direct doubt on the City's rationale for its ordinance. (Stipulation at 3; Joint Statement at 4-5.) The third issue is whether the ability of adult arcade uses to survive is at issue in this case. (Stipulation at 3.) The fourth issue for the Court is to determine the burden of proof on the arcade survival issue. (*Id.*) Following the Court's ruling on the preliminary issues, the parties will file a second joint conference statement proposing a process for the remainder of the litigation.

II. Discussion

A. Free Speech Rights and the Regulation of Adult Establishments

In *Alameda Books*, a divided Supreme Court revisited the standard established in *Renton* and used by courts to review city ordinances regulating adult entertainment establishments for compliance with the First Amendment. Before considering the specific issues raised by the parties, this Court recapitulates the recent evolution of the *Renton* standard.

1. The *Renton* Framework

In *Renton*, a majority of the Supreme Court first agreed on the constitutional standard to which cities must adhere when enacting ordinances targeting the secondary effects of adult businesses, such as adult bookstores and movie theaters.[3] 475 U.S. 41 (1986). This test requires a court to make three inquiries into the design and effect of the regulation. First, a court must review the ordinance to determine if it bans the protected activity altogether. If the ordinance is not a ban, but rather restricts the operation of the establishments in some way, then it should be analyzed as a time, place, and manner regulation. *Id.* at 46.

Next, the court must consider whether the ordinance was designed to reduce secondary effects associated with the speech activity or, instead, if it was intended to suppress the content of the speech activity itself. *Id.* at 47. If the ordinance targets the secondary effects, it should "be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations," *id* at 49; i.e. it should receive intermediate scrutiny. Otherwise, the ordinance must survive strict scrutiny.

Finally, assuming that the ordinance receives intermediate scrutiny, a city must show that it is narrowly tailored to meet a substantial government interest, and that it does not unreasonably limit alternative avenues of communication. *Id.* at 50. The evidentiary burden required to show that a regulation is designed to meet a substantial government interest is not severe. A city may use whatever

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[3] The Court's previous attempt to articulate a clear standard to apply to such regulations failed. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

evidence it reasonably believes is relevant to addressing the identified problems. *Id.* at 51-52. The First Amendment does not require a city to conduct new studies. The city may even rely on studies performed by other cities, or involving different methods of regulation, so long as the evidence could be reasonably relied upon to justify the proposed restriction. *Id.*

Under *Renton*, if the ordinance survives this three-step inquiry, it is a constitutional restriction on speech.

2. *Alameda Books*

In *Alameda Books*, a divided Supreme Court elaborated on the *Renton* framework. Writing for a four justice plurality, Justice O'Connor applied *Renton* to review § 12.70(C).[3] Although the plurality did not revise the *Renton* standard, it clarified what type of evidence a city may rely upon in showing that its regulation meets a substantial government interest. First, Justice O'Connor stated that

> while the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

[3] Justice O'Connor was joined by Chief Justice Rehnquist, and by Justices Scalia and Thomas. Justice Scalia also wrote a short concurrence in which he expressed his well-known, but lone, position that "[t]he Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." 535 U.S. at 443-44.

535 U.S. at 437. Thus, where the evidence relied upon supports multiple inconsistent inferences about the effect of the proposed regulation on secondary effects, a city may still rely on the evidence so long as one such inference justifies the design of the ordinance.

Next, she articulated the burden-shifting framework that a court should employ in evaluating the evidence presented as part of a city's showing of substantial government interest. Starting with the proposition that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest," *Id.* at 438 (quoting *Renton* at 51-52.), she then cautioned that "[t]his is not to say that a municipality can get away with shoddy data or reasoning." *Id.*

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (citing *Erie v. Pap's A.M.*, 529 U.S. 277 (2000)).

Reasoning from these statements, Justice O'Connor concluded that the City of Los Angeles's reliance on the 1977 study was sufficient to demonstrate that the ordinance was designed to meet a substantial government interest. *Id.* at 439. The City "complied with the evidentiary requirement in *Renton*." *Id.* Left unstated by the plurality, but necessarily implied, is the fact that the evidentiary burden now rests with the plaintiffs to cast doubt on the City's rationale.

Writing for the dissenting justices, Justice Souter rejected the conclusion arrived at separately by both the plurality and Justice Kennedy that the 1977 study provided any support for § 12.70(C).[4] He noted that the 1977 study focused on the secondary effects resulting from the concentration of adult business establishments, not effects arising from the traditional combination of selling and viewing activities under one roof. *Id.* at 463-64. Because the dissenting justices discovered no support for the ordinance in the 1977 study, they would have deemed the ordinance content based and an unconstitutional abridgment of free speech activity.

Justice Kennedy provided the necessary fifth vote to reverse the grant of summary judgment, but he did not join the plurality's opinion. Rather he wrote separately "for two reasons." 535 U.S. at 444. First, he criticized the *Renton* framework for inaccurately designating ordinances like the ones at issue in *Renton* and *Alameda Books* "content neutral." Justice Kennedy contended that this "was something of a fiction" and not a particularly helpful

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[4] Justice Souter's opinion was joined in its entirety by Justices Stevens and Ginsburg. Justice Breyer joined only as to part II.

one. "After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." 525 U.S. at 448. Nevertheless, this distinction is essentially technical because Justice Kennedy also found that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 448. Thus, "zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. . . . For this reason, we apply intermediate rather than strict scrutiny." *Id.* at 449.

Second, Justice Kennedy articulated an expanded "substantial government interest" inquiry. The plurality opinion, like the *Renton* majority, focused on the evidentiary showing required to support the demonstration that the ordinance meets a substantial government interest. Justice Kennedy agreed with the plurality that the evidence offered by the City need only reasonably support the justification advanced in support of the ordinance. *Id.* at 449, 451-52. "[A] city must have latitude to experiment, at least at the outset, and . . . very little evidence is required." *Id.* at 451. Therefore, "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Id.* A district court's task is to review the evidence relied on by the city to insure that it reasonably justifies the ordinance. Like the plurality, Justice Kennedy held that the plaintiffs must have an opportunity to cast direct doubt on the city's rationale. "If these assumptions can be proved unsound at trial, then

the ordinance might not withstand intermediate scrutiny." *Id.* at 453.

However, unlike the plurality, Justice Kennedy stated that a court should review the evidence only after it has considered whether the municipality advanced a legitimate proposition justifying the ordinance. It is here that Justice Kennedy moved beyond *Renton* and the plurality opinion to require something more of the authors of ordinances regulating adult entertainment establishments. "[A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449. Thus, "[t]he rationales of the ordinance must be that it will suppress secondary effects – and not by suppressing speech." *Id.* at 449-50.

By adding this requirement to the *Renton* structure, Justice Kennedy noted that the plurality's approach failed to address "how speech will fare under the city's ordinance." *Id.* at 450. Whereas the plurality only considered the narrow question of whether the evidence relied on by the City reasonably justified the design of the ordinance,

> [t]his question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

Id. at 449. Justice Kennedy reasoned that the application of intermediate scrutiny to zoning ordinances is appropriate

only when the ordinance's rationale is that it will reduce the externality costs associated with the speech activity "without substantially reducing speech." *Id.* at 450. "It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech." *Id.*

Turning to the instant ordinance, Justice Kennedy concluded that the City's claim "must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute." *Id.* at 451. Justice Kennedy interpreted the City's rationale thus and held that the City cleared this new hurdle.

With this analysis, Justice Kennedy inserted a new "proportionality requirement" into the substantial government interest inquiry.[5] A district court must review the city's justification for the zoning ordinance in order to insure that the law is designed to significantly reduce the disfavored secondary effects while leaving the quantity and accessibility of speech substantially intact. So long as the city complies with this requirement, and so long as the city offers some evidence that reasonably supports its justification, it has made an initial showing that the regulation was designed to meet a substantial government interest. Justice Kennedy analyzed § 12.70(C) under this new regime and concluded that it is "reasonably likely to

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[5] The term "proportionality requirement" was not used by Justice Kennedy but has since been adopted by circuit courts applying this part of his opinion. *See, e.g., Fair Public Policy*, 336 F.3d at 1162 (9th Cir. 2003).

cause a substantial reduction in secondary effects while reducing speech very little." *Id.* at 453. Accordingly, he joined the plurality in reversing the grant of summary judgment. In his conclusion, however, he noted that the plaintiffs must have the opportunity to disprove the assumptions relied on by the City in justifying the ordinance. "If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." *Id.*

3. Ninth Circuit Applications of *Alameda Books*

The Ninth Circuit first applied the holding in *Alameda Books* in *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003). There, the circuit court reviewed an Arizona statute that required the closing of "sexually-oriented businesses" between 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between 1:00 a.m. and noon on Sunday. All of the justices agreed that Justice Kennedy's opinion in *Alameda Books* was the controlling opinion because he concurred in the judgment on the narrowest grounds. 336 F.3d at 1161 (citing *Marks v. United States*, 430 U.S. 188, 193 (1976)).

First, the court applied Justice Kennedy's revised classification approach. It held that the Arizona statute was content based on its face, and then, following Justice Kennedy, it reviewed the statute's full record to determine whether its purpose was to reduce the secondary effects arising from the late-night operation of the regulated establishments.[6] *Id.* at 1164-65. After finding various

[6] The Court notes that the Ninth Circuit broadened Justice Kennedy's holding somewhat. Whereas he limited his holding to zoning

(Continued on following page)

"objective indicators of intent" in the record, the majority was satisfied that the regulation was directed at the secondary effects, and not at the content of the speech itself. *Id.* It therefore reviewed the statute using intermediate scrutiny. *Id.* at 1165.

However, the majority declined to apply the other factor contained in Justice Kennedy's *Alameda Books* opinion, the "proportionality requirement." The circuit court reasoned that applying the proportionality requirement to regulations limiting the hours of operation for certain businesses – "time" restrictions rather than "place" restrictions like the one at issue in *Alameda Books* – would invariably lead to the invalidation of all such regulations. *Id.* at 1163. This is because these statutes expressly do what Justice Kennedy said was improper – they reduce the secondary effects of speech by reducing the quantity of the speech itself. The court noted that the constitutionality of such statutes had uniformly been upheld by circuit courts pre-*Alameda Books*, and it reasoned that Justice Kennedy did not intend "to precipitate a sea change in this particular area of First Amendment law." *Id.* at 1162. The Ninth Circuit concluded that such a result could not be reconciled with Justice Kennedy's insistence that "the central holding of *Renton* remains sound." *Id.* at 1162 (quoting *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring in judgment)). Justice Canby dissented from this holding, arguing that the majority

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ordinances, which he believed inherently possess a prima facie legitimate purpose, i.e. reducing the negative externalities of land use, the Ninth Circuit generalized his approach to include *all* regulations designed to ameliorate and the secondary effects associated with the commerce of sexual and pornographic speech. 336 F.3d at 1164-65.

simply chose not to apply Justice Kennedy's holding, which they admitted was controlling. He would have applied the proportionality requirement and invalidated the statute under *Alameda Books.*

In the circuit's next application of *Alameda Books,* it again confronted a time restriction. *Dream Palace v. County of Maricopa,* 384 F.3d 990 (9th Cir. 2004). Following *Fair Public Policy,* the panel declined to apply the proportionality requirement and, applying the balance of the *Renton-Alameda Books* standard, it held that the regulation survived intermediate scrutiny. 384 F.3d at 1013 n.16.

The Ninth Circuit has applied *Alameda Books* two more times since *Dream Palace.* In *World Wide Video v. Spokane,* 368 F.3d 1186 (9th Cir. 2004), the court expressly reaffirmed that Justice Kennedy's opinion represented the holding in *Alameda Books.* 368 F.3d at 1193. It also held that the burden-shifting framework discussed by the *Alameda Books* plurality was part of the holding because Justice Kennedy implicitly concurred with it. *Id.* at 1194. Finally, the panel unanimously applied the proportionality requirement to the zoning restriction before the court. However, it gave the requirement minimal effect, reasoning that it simply "dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication." *Id.* at 1195. Because the panel found that the ordinance met this prong of the original *Renton* standard, it held that it also met Justice Kennedy's proportionality requirement.

Finally, in *Gammoh v. La Habra,* 395 F.3d 1114 (9th Cir. 2005), the latest Ninth Circuit case to review a law regulating sexually oriented adult businesses, the panel

confronted a city ordinance requiring adult cabaret dancers to remain two feet from patrons during performances. It applied Justice Kennedy's modified *Renton* framework to the ordinance, but it did not mention the proportionality requirement, perhaps because the ordinance clearly did not eliminate any speech but only regulated the manner of its expression.

B. Applying *Alameda Books* on Remand

The Court turns to the issues raised by the parties in their cross-motions. In its motion on preliminary issues for determination, the City brings forward three general arguments that track the rubrics contained in the January 22, 2003 Stipulation. In contrast, the plaintiffs in their omnibus motion raise numerous specific issues that fall within each general category. For each of the four broad issues contained in the Stipulation, the Court first explains its findings, and then addresses the issues raised by the parties.

1. The Holding of *Alameda Books*

a. The Court's General Findings

The parties first ask this Court to determine the holding of *Alameda Books*; specifically, whether Justice Kennedy's concurrence in *Alameda Books* changed the standard established by the Supreme Court in *Renton* for evaluating the constitutionality of ordinances regulating sexually explicit businesses. (Joint Statement at 2, 3.)

The City argues that *Renton* remains the sole standard by which the issues in this case are to be resolved, and that Justice Kennedy stated this much when he

insisted that "the central holding of *Renton* remains sound." (Def.'s Mem. of P. & A. at 4.) The plaintiffs, on the other hand, contend that Justice Kennedy's concurring opinion imposes additional hurdles that a content based, secondary-effects-justified restriction must pass, and that these are more rigorous than the original *Renton* test, which applies to content neutral, time, place, and manner restrictions. (Joint Statement at 3.) Under the plaintiffs' view, the challenged ordinance could survive traditional time, place, and manner scrutiny, and would still be facially unconstitutional if it failed to pass the heightened intermediate scrutiny test which the plaintiffs contend was created by Justice Kennedy. (*Id.*) Specifically, the plaintiffs contend that the heightened test requires "a demonstration that the likely impact of the zoning ordinance on expression is minimal compared to the extent to which it will likely reduce secondary effects." (Pls.' Resp. at 3.)

For the reasons that follow, this Court finds that, while the *Renton* standard is still the controlling standard in this case, that standard was modified by the Supreme Court's holding in *Alameda Books*. Specifically, the Court agrees with the plaintiffs that the proportionality requirement adds a new element to the *Renton* inquiry, but it finds that the City has met its initial evidentiary burden, and that the burden now lies with the plaintiffs to show that the ordinance fails the new standard.

Based on the above review of *Alameda Books* and its progeny, the Court makes the following findings regarding the standard it must apply in reviewing § 12.70(C). First, the court finds that Justice Kennedy's opinion in *Alameda Books* represents the holding of the case under *Marks*, 430 U.S. at 193. His opinion concurred in the judgment of the

case on the narrowest grounds, and therefore must be regarded as the controlling opinion. The Ninth Circuit expressly recognized this in *Fair Public Policy,* 336 F.3d at 1161, and in *World Wide Video,* 368 F.3d at 1193. This addresses then the first issue raised by the plaintiffs.

Next, following Justice Kennedy's statement that "the central holding of *Renton* remains sound," *Alameda Books,* 535 U.S. at 448, the Court finds that the overall three-step framework of *Renton* has been supplemented but not overturned. To recapitulate the holding of *Renton,* a court must first review the ordinance to see if it completely bans the protected activity. If not, then the court should determine if the regulation is designed to reduce the disfavored secondary effects associated with the regulated activity and not the content of the speech activity itself. If so, the court applies intermediate scrutiny to such regulations: it determines whether the regulation is narrowly tailored to serve a substantial governmental interest, and whether it leaves open alternative avenues of communication. In determining whether the regulation is designed to meet a substantial government interest, the court should review the evidence relied on by the legislating body to insure that it reasonably justifies the ordinance.

Finally, the Court also finds that *Alameda Books* made three fundamental modifications to the *Renton* standard. The first two changes will be discussed here, and the final change will be discussed in the Court's consideration of the second overall issue, *infra.*

The first modification created by *Alameda Books* is that the classification of the regulation as content neutral or content based is irrelevant to the determination of which level of scrutiny to apply. This is clearly the case

when the regulation is a zoning ordinance. Justice Kennedy explicitly stated that zoning ordinances "have a prima facie legitimate purpose: to limit the negative externalities of land use. . . . For this reason, we apply intermediate rather than strict scrutiny." 535 U.S. at 449. Thus, when reviewing zoning ordinances restricting, but not banning, the operation of adult establishments, a court should apply intermediate scrutiny.[7]

Second, at the point where a court reviews the ordinance to determine if it is designed to meet a substantial government interest, the court should engage in the two-step inquiry articulated by Justice Kennedy. "First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition?" *Id.* at 449. Thus, the first step is to examine the justification offered by the regulation's authors to insure that it complies with the proportionality requirement. This requirement mandates that the regulating body "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449. Next, the court should review the evidence relied on by the legislative body to make certain that it is reasonably sufficient to support the rationale.

The Court notes the special emphasis Justice Kennedy placed on the review of a city's rationale with regard to "how speech will fare." *Id.* at 450. As noted above, while

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[7] As noted above, the Ninth Circuit expanded the use of this approach beyond the consideration of zoning ordinances in *Fair Public Policy.* See n. 5, *supra.*

he agreed with the plurality in its review of the evidence relied upon by the City, he believed that "more attention should be given" to the examination of the rationale itself. *Id.* at 449. Turning to the first question, Justice Kennedy wrote that "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* He stressed, that "[t]he rationale of the ordinance must be that it will suppress secondary effect – and not by suppressing speech." *Id.* at 450. Specifically, he required that the rationale of the proposed ordinance is that it will leave "the quantity of speech . . . substantially undiminished, and that total secondary effects will be significantly reduced." *Id.* at 451. In Justice Kennedy's view, "[o]nly after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition?" *Id.*

In the cases since *Alameda Books* came down, the Ninth Circuit has largely declined to apply the proportionality requirement. In both *Fair Public Policy* and *Dream Palace*, the panels distinguished the regulations at issue as "time" restrictions that Justice Kennedy never meant to subject to the proportionality requirement. Because such regulations directly reduce speech through the closing of the adult entertainment establishments, "the application of Justice Kennedy's proportionality analysis to this particular type of secondary effects law would invalidate *all* such laws, and we are satisfied that he never intended such a result. His proportionality requirement was simply not designed with this particular type of restriction in mind." *Fair Public Policy*, 336 F.3d at 1163. Had Justice Kennedy intended such a drastic result, the panel reasoned, he would not have made the point that "the, central

holding of *Renton* remains sound." *Id.* (*quoting Alameda. Books,* 535 U.S. at 448).

Thus, the Ninth Circuit found a fundamental difference in the way courts should review "time" and "place" restrictions: the former requires "the closure of *all* adult entertainments for a limited time" as opposed to the latter, which regulates the location of such businesses. 336 F.3d at *1163* (italics in original). The necessary implication is that the proportionality requirement must apply in the instant case, which involves a "place" restriction, and is the case Justice Kennedy had before him when he stated the requirement.

In *Gammoh* the Ninth Circuit did not mention the proportionality requirement when it applied the *Renton-Alameda Books* standard to a regulation limiting the proximity of exotic dancers to their clientele. 395 F.3d at 1126-27. In that case, the requirement may not have arisen as an issue, not because its effect would have been too dramatic, but rather because it was nil: the proportionality requirement simply had no application where a regulation did not reduce speech at all but merely proscribed the particular manner of its expression.

As noted above, the only case in which the Ninth Circuit applied the proportionality requirement was *World Wide Video.* There, the panel held that the requirement "dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication." 368 F.3d at 1195. The Ninth Circuit could not have intended this as a general rule, however, as Justice Kennedy did not write separately in *Alameda Books* merely to reiterate an already well-settled aspect of the *Renton* test, the "alternative avenues of communication" prong. Indeed,

the fact that he emphasized the proportionality requirement so strongly, and that he located it within the "substantial government interest" inquiry, demonstrates that he did not intend it to merely repeat the "alternative avenues of communication" step in *Renton*. Rather, the *World Wide Video* panel must have found that, in that particular instance, the proportionality requirement and the "alternative avenues of communication" requirement coincided.

Accordingly, this Court finds that the proportionality requirement is a part of the traditional *Renton* standard. It requires a city to justify an ordinance regulating adult entertainment establishments on the grounds that the ordinance will reduce the secondary effects associated with such commerce, and that this reduction in secondary effects will not substantially diminish the underlying speech. Because Justice Kennedy found that the City's rationale passes this stage of review, *see Alameda Books, supra,* at 451-53, the Court simply notes that the assertions attributed by Justice Kennedy to the City will be understood to be the City's position with regard to the design and effect of the ordinance. *See, e.g., id.* at 451 ("The claim, therefore, must be that . . . the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.").

b. The Parties' Specific Contentions

The foregoing discussion resolves the issue raised first by the City as well as the remainder of the plaintiffs' arguments contained in its first section. In order to be

clear, however, the Court specifically addresses each of the arguments made.

The City argues that the *Renton* standard remains unchanged. The Court finds that *Renton* is still controlling, but that the *Renton* standard was modified by *Alameda Books* in the ways just discussed (and also discussed in the next section).

The plaintiffs argue that the entirety of Justice Kennedy's concurrence is binding. The Court finds that this is so under *Marks*, 430 U.S. at 193. (However, it should go without saying that only the holdings of Justice Kennedy's opinion are binding, not dicta contained therein.)

The plaintiffs argue that the City has the burden to affirmatively demonstrate that the quantity of speech will be substantially undiminished by the ordinance and that total secondary effects will be significantly reduced. It is true that the City bears the ultimate burden of showing that the ordinance was designed to address a substantial government interest. As discussed in the next section, however, the Supreme Court held that the City carried its initial burden of showing that § 12.70(C) meets the substantial government interest. The burden now shifts to the plaintiffs to show that the ordinance will substantially diminish the quantity of speech, or that it will not significantly reduce secondary effects. If the plaintiffs accomplish this, the City still has the opportunity to bring forward new evidence justifying the ordinance. *See Alameda Books, supra*, at 438-39 (plurality opinion), 453 (Kennedy, J., concurring in judgment).

The plaintiffs argue that the City's premise cannot be merely that cutting adult speech in half would probably

reduce secondary effects proportionately. As Justice Kennedy specifically stated that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion." 535 U.S. at 449. Accordingly, the Court agrees with the plaintiffs that this cannot be the City's premise.

The plaintiffs argue that the City must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects while leaving the quantity and accessibility intact. The Court finds that, pursuant to Justice Kennedy's discussion and holding in *Alameda Books*, the City has carried this burden through its reliance on the 1977 study. The evidentiary burden now shifts to the plaintiffs. The City, however, still bears the burden of demonstrating that the ordinance leaves open alternative avenues of expression.

The plaintiffs argue that the burden-shifting structure described by the plurality in *Alameda Books* is now part of the *Renton* standard. As discussed next, the Court finds that this is so.

2. The Plaintiffs' Burden of Proof to Cast Direct Doubt on the City's Rationale for § 12.70(C)

a. The Court's General Findings

The third addition to the *Renton* structure is the burden-shifting framework expressly articulated by the plurality, and alluded to by Justice Kennedy in his conclusion. Under the *Renton* analysis, as further clarified in *Alameda Books*, the city bears the ultimate burden of showing that the ordinance it enacted passes intermediate scrutiny. To show that the ordinance addresses a substantial

government interest, the city "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and substantial, independent government interest." *Alameda Books,* 535 U.S. at 438 (quoting *Renton,* 475 U.S. at 51-52).

Next, if the court, after reviewing the evidence presented by the authors of the regulation, finds that the evidence is reasonably sufficient to support the rationale for the law, the burden shifts to the plaintiffs "to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual finds." 535 U.S. at 438-39. *See also id.* at 453 (Kennedy, J., concurring in judgment) ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny.") Then, "[i]f the plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

The plurality and Justice Kennedy both held that the City had met its initial evidentiary burden. *Id.* at 439 (plurality opinion), 445 (Kennedy, J., concurring in judgment). Thus, the business owners in the case at hand must be given a chance to cast direct doubt on the City's rationale for the ordinance by either 1) demonstrating that the City's evidence does not support its rationale or 2) furnishing evidence that disputes the City's factual findings. *Id.* at 439. If the plaintiffs are successful at casting doubt on the City's rationale, then the burden shifts back to the City to "supplement the record with evidence renewing support" for the rationale behind the ordinance. *Id.*

Relying on their own evidence, the plaintiffs may take either of two different paths to dispute the rationale. They can demonstrate that the ordinance will not substantially diminish the targeted secondary effects. If they accomplish this, then they have demonstrated that the ordinance does not meet a substantial government interest and therefore fails intermediate scrutiny. The plaintiffs can also show that the ordinance will reduce secondary effects but that it will accomplish this by diminishing speech "in the same proportion." *Id.* at 449. Justice Kennedy made it clear that "[t]he rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech." *Id.* at 449-50. In reaching his conclusion that the City's rationale was not aimed at speech, he relied on the assumption that "[d]ispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little." *Id.* at 453. Justice Kennedy's reasoning was that if two neighboring businesses split the dispersed stores will attract fewer patrons (e.g. 49 patrons each instead of 100 patrons when combined). This, in turn, would lead to a "dramatic" reduction of secondary effects assuming that 49 patrons at each establishment will attract fewer thieves, prostitutes or "other ne'er-do wells," than 100 patrons concentrated at one establishment. *Id.* at 452-453. Justice Kennedy further assumed that while the secondary effects may be substantially reduced, the speech reduction might be very little or may increase due to the "hospitable surroundings." *Id.* at 453.

At the end of his opinion, Justice Kennedy stated that "[i]f these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." *Id.* This language, and his opinion read in its

entirety, suggests that plaintiffs can "cast direct doubt" on the City's asserted rationale if they furnish evidence showing that the City has violated the "proportionality requirement." If the plaintiffs can show that the ordinance in fact will substantially diminish the quantity and accessibility of speech, then the rationale advanced by the City is invalid and the ordinance is unconstitutional.

Thus, the proportionality requirement comes into play twice – when a court initially reviews the justification advanced by a city for its ordinance and later when the court weighs the evidence proffered by the parties (assuming that the plaintiffs have offered any evidence). In both instances, the court must be alert to the possibility that the ordinance only accomplishes its goal of reducing secondary effects through the suppression of speech.

b. The Parties Specific Contentions

The Court now addresses the specific arguments raised by the parties with regard to the relative burdens of the parties at this stage.

The City argues that the plaintiffs are unable to cast direct doubt on the rationale for the ordinance as a matter of law. The Court does not agree. The plaintiffs have the opportunity to present evidence showing that the ordinance will not significantly reduce secondary effects, or that it will do so by substantially diminishing speech.

The plaintiffs raise five issues pertaining to the City's burden of proof as to the impact of the ordinance. The plaintiffs first two arguments involve the survivability of adult arcades discussed in the next section. Accordingly, the Court addresses those arguments there.

The plaintiffs next claim that the City bears the burden of proving that enforcement of the ordinance will not significantly reduce the total number of adult bookstores and adult arcades in Los Angeles. The Court does not find this to be so. As discussed above, both the plurality and Justice Kennedy held that the City carried its initial burden of showing that the ordinance meets a substantial government interest. Under the plurality's burden-shifting scheme, the burden now shifts to the plaintiffs. One way that they may cast direct doubt on the City's rationale is to produce evidence showing that the ordinance will substantially reduce speech, and to that end, evidence showing that the ordinance will result in the closing of adult "businesses" may be pertinent.

The plaintiffs next argue that the City bears the burden of proof to show that the ordinance will leave a sufficient number of countable sites to absorb the dispersal effect of the statute on adult entertainment businesses. The Court finds that under *Renton* this is one way in which the City can show that the ordinance leaves open alternative avenues of expression. The City is required to meet this prong of the *Renton* test, not the plaintiffs. Traditionally, this has meant demonstrating that the combined effects of the ordinance and other zoning restrictions afford the plaintiffs "a reasonable opportunity to open and operate an [adult entertainment business] within the city." *Renton*, 475 U.S. at 54. There may be other ways in which a City can demonstrate that the ordinance leaves open alternative avenues of expression.

The plaintiffs next argue that the City has the burden of showing that the ordinance does not unconstitutionally interfere with the public's ability to obtain information concerning the content of the affected videotapes and

DVDs. The Court does not agree. As discussed above, the City has already carried its initial burden demonstrating that the ordinance meets a substantial government interest. Accordingly, the plaintiff now bear [sic] the burden of showing that the ordinance substantially diminishes the public's accessibility to the protected speech.

The plaintiffs also raise four issues pertaining to the City's rationale for the ordinance. The plaintiffs argue that the City must prove 1) that the ordinance will likely reduce secondary effects, 2) that it will cause businesses to disperse rather than shut down, and that 3) the agglomeration of adult businesses produces a greater amount of secondary effects than the additive effects of a similar number of dispersed businesses. As discussed above, the Supreme Court held that the City has carried its initial burden of proof. Therefore, the burden now rests with the plaintiffs to cast direct doubt on the City's rationale. To that end, the plaintiffs may produce evidence showing that the ordinance will not reduce secondary effects or that it will do so by substantially diminishing speech. One way of accomplishing the latter may be to demonstrate that the affected businesses will shut down rather than disperse.

The plaintiffs also request the Court to order the City to articulate in writing and with specificity all the secondary effects that the City believes the ordinance will reduce. The Court denies this request. The particular secondary effects as have already been enumerated. The 1977 study relied on by the City concluded that concentrations of adult businesses result in higher rates of prostitution, robbery, assaults, and thefts in neighboring communities. *See* Los Angeles Dept. of City Planning, City Plan Case No. 26475, City Council File No. 74-4521-S.3, *Study of the Effects of the Concentration of*

Adult Entertainment Establishments in the City of Los Angeles (June 1977).

3. Whether the Ability of Adult Arcades to Survive is at Issue

a. The Court's General Findings

In their motion, the plaintiffs argue that *Alameda Books* makes the issue of adult arcade survivability material to the determination of § 12.70(C)'s constitutionality. Previously, the Supreme Court had indicated that a court should not consider the economic viability of businesses affected by the regulation of adult entertainment establishments. *See American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact."). However, Justice Kennedy indicated in his *Alameda Books* opinion that "[t]he City's premise cannot be" that the ordinance will require one business to close. 535 U.S. at 450-51. "The premise, therefore, must be that businesses – even those that have always been under one roof – will for the most part disperse rather than shut down." *Id.* at 451. This strongly suggests that if the plaintiffs can prove that the affected businesses will for the most part shut down rather than disperse, they may be able to demonstrate that the effect of the ordinance is to substantially diminish speech. Thus, business survivability in general is a material issue in this case.

The City argues that the issue of arcade survivability is precluded by a stipulation entered into by the parties early on in the course of this litigation. This stipulation bars the plaintiffs from asserting the proposition that no adult arcade can survive economically, and prohibits the

City from seeking discovery of financial information about the operation of the Alameda and Highland. The plaintiffs now seek to be released from this agreement because, they argue, Justice Kennedy's holding in *Alameda Books* now makes the issue of arcade survivability a material issue.

The Court finds that the parties should be excused from the requirements of the stipulation. A stipulation is an agreement between opposing parties ordinarily entered into for the purposes of avoiding delay or expense in the course of an action. It obviates the need for proof on a narrow range of issues. *County of Sacramento v. Workers' Comp. Appeals Bd.*, 77 Cal.App.4th 1114, 1118 (2000). A court may grant relief from a stipulation in response to fraud, mistake of fact, or some other circumstances rendering enforcement of the stipulation unjust. *In re Marriage of Kerry*, 158 Cal.App.3d 456, 465 (1984). Here, it was not reasonably foreseeable that, during the course of this litigation, the Supreme Court would announce a modification of the governing legal standard that would make the economic viability of adult entertainment businesses, such as the adult arcades, a potential material issue in the case. Accordingly, the Court is inclined to excuse both parties from the terms of the stipulation, thereby permitting the plaintiffs to raise the issue of economic viability, and permitting the defendants to conduct discovery relating to the financial operation of Alameda and Highland.

b. The Parties' Specific Contentions

As noted above, the plaintiffs make two specific arguments regarding the survivability of arcades. The plaintiffs argue that the City should have the burden of

proof to show that adult arcades do not constitute a distinct medium of expression under *Ladue v. Gilleo,* 512 U.S. 43 (1994) (ordinance banning residential signs, "an important and distinct medium of expression," is unconstitutional under the First Amendment). The plaintiffs argue that the holding in *Ladue* should be extended to include adult arcades.

The Court notes .that § 12.70(C) is not like the ordinance at issue in *Ladue.* The ordinance in *Ladue* was an explicit ban on residential signs, albeit with specific exceptions. *Id.* at 46-47. The Los Angeles ordinance is a zoning ordinance that does not expressly ban any activity, but rather regulates the location and manner of operation of adult entertainment establishments. Moreover, the Supreme Court in *Ladue* emphasized the "unique and important" nature of residential signs. *Id.* at 54. Residential signs are "a venerable means of communication" that contain "political, religious, or personal messages." *Id.* They "play an important part in political campaigns." *Id.* "They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression." *Id.* at 55. The Supreme Court found that the ordinance did not qualify as a time, place, or manner regulation because it did not leave open ample alternative channels for communication. *Id.* at 56. The city in that case failed to persuade the court "that adequate substitutes exist for the important medium of speech that Ladue has closed off." *Id.*

The speech at issue here is expressed, not with signs, but through the medium of sexually oriented adult movies. The plaintiffs argue that adult arcades are "an important and distinct medium of expression." However, the Supreme

Court in *Ladue* emphasized the important role yard signs have long played as a "a venerable means of communication" that contain "political, religious, or personal messages." *Id.* at 54. It described yard signs as "unique and important" and "a venerable means of communication." The language used in *Ladue* indicates that such heightened protection was not meant to extend to all forms of expressive conduct. The Court finds that the holding in *Ladue* does not reach adult arcades.

Finally, the plaintiffs argue that the City bears the burden of showing that the ordinance will not significantly reduce the number of adult arcades in Los Angeles. As already discussed, the Court finds that the burden of showing that the ordinance will significantly reduce speech now lies with the plaintiffs, not the City.

III. Conclusion

The Court summarizes its findings as follows.

With regard to the holding of *Alameda Books*, the Court finds that Justice Kennedy's concurrence represents the holding of the case; that the *Renton* standard still applies to the First Amendment review of ordinances regulating sexually explicit businesses; and that the *Renton* standard has been modified in the following ways.

First, ordinances such as § 12.70(C) are content based rather than content neutral; however they still receive intermediate scrutiny.

Next, at the point where a court reviews the ordinance to determine if it is designed to meet a substantial government interest, the court now engages in a two-step inquiry. "First what proposition does a city need to advance in order

to sustain a secondary-effects ordinance? Second how much evidence is required to support the proposition?" *Alameda Books, supra,* at 449. The first inquiry includes the application of the proportionality requirement. Thus, a court must review the rationale advanced by the city to insure that it is designed to leave "the quantity of speech . . . substantially undiminished, and that total secondary effects will be significantly reduced." *Id.* at 450. Then, the Court must review the evidence presented in support of the ordinance to insure that it reasonably justifies the ordinance.

Next, while the city bears the ultimate burden of showing that the ordinance meets a substantial government interest, once the city meets its initial evidentiary burden, the burden shifts to the party challenging the ordinance to "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual finds." *Id.* at 438-39. If the challenging party presents evidence calling the city's rationale into question, the city has an opportunity "to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

At present, the City has carried its initial evidentiary burden showing that the ordinance is designed to meet a substantial government interest. Thus, the burden now lies with the plaintiffs to produce evidence showing that the enforcement of § 12.70(C) would not significantly reduce secondary effects, or that it would substantially diminish speech. However, the City still bears the ultimate burden of proof on this issue; thus, if the plaintiffs present evidence "casting doubt" on the City's rationale, the City will prevail only if a preponderance of the evidence demonstrates that

the ordinance will significantly reduce secondary effects and leave the quantity of speech substantially undiminished.

The Court finds that the issue of whether enforcement of § 12.70(C) would make adult arcades economically unviable is an issue in this case because, as Justice Kennedy explained, the ordinance may not reduce secondary effects by substantially diminishing speech. "The claim, therefore, must be that . . . the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute." *Alameda Books, supra,* at 451. The Court releases the parties from the terms of the stipulation barring the plaintiffs from raising the issue of the economic viability of adult arcades and prohibiting the City from seeking discovery of the plaintiffs' financial operations. The plaintiffs currently bear the burden of showing that adult arcades will close as a result of the enforcement of § 12.70(C). Such a showing would be evidence that the ordinance substantially diminishes the quantity of speech, and would call into question the rationale advanced by the City to justify the ordinance. Also, the Court finds that adult arcades are not "an important and distinct medium of expression" under *Ladue v. Gilleo,* 512 U.S. 43 (1994).

Finally, the Court notes that the City also bears the burden of showing that the ordinance leaves open alternative channels of communication, the final element of the *Renton* standard.

IT IS SO ORDERED.

Dated: June 10, 2005 /s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

No. 05-374

NOV 21 2005

IN THE

Supreme Court of the United States

DEJA VU OF CINCINNATI, L.L.C.,

Petitioner,

v.

THE UNION TOWNSHIP BOARD OF TRUSTEES, KENNETH GEIS IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF UNION TOWNSHIP, AND UNION TOWNSHIP POLICE DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR UNION TOWNSHIP PARTIES

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INTRODUCTION

The United States Court of Appeals for the Sixth Circuit relied upon decisions of the United States Supreme Court in deciding that Union Township's resolution regulating the operation of adult cabarets was constitutional. The Court evaluated the resolution in accordance with the four part test outlined in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), and reaffirmed in *City of Erie v. Pabst AM*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). The Sixth Circuit found that the resolution was within the constitutional power of the government, furthered an important or substantial governmental interest unrelated to the suppression of free expression and left open ample alternative channels for communication. This test has been repeatedly applied by the United States Supreme Court and Circuit courts throughout the country, and it is not necessary for this Court to revisit the issue.

This Court has repeatedly held that communities have the right to regulate the negative secondary effects of adult businesses and that a regulation which is designed to decrease secondary effects should be subject to intermediate rather than strict scrutiny. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). That is exactly the standard applied by the Sixth Circuit in this case in upholding both the hours of operation and disclosure of personal information provisions in the resolution.

The *en banc* ruling of the United States Court of Appeals for the Sixth Circuit was correct in all respects and relied upon well settled law. Petitioner's attempt to characterize the holding of this Court in *City of Los Angeles v. Alameda*

Books, *supra*, as "fractured" is misguided. In fact, five justices ruled the decision in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), was sound law and that an ordinance designed to decrease secondary effects should be subject to intermediate scrutiny. That is exactly the level of scrutiny applied by the Sixth Circuit in this case and the decision should not be disturbed.

STATEMENT OF THE CASE

On August 30, 1995, Union Township Zoning Director, Lois Ellison, attended a seminar entitled: "Sexually Oriented Businesses, Developing a Local Ordinance and Implementation Strategy". While at the seminar, Ellison was provided with sample legislation and resource materials regarding the harmful effects of sexually oriented businesses on the areas in which they are located. (Geis Affidavit, App. 223 par. 2).[1] The studies which she received had been prepared for Garden Grove, California; Los Angeles, California; Indianapolis, Indiana; Minneapolis, Minnesota; Cleveland, Ohio; Oklahoma City, Oklahoma; Austin, Texas; Beaumont, Texas; Houston, Texas; Phoenix, Arizona; Seattle, Washington; Amarillo, Texas, and Whittier, California. *Id.*

Kenneth Geis, the township administrator, met with Ellison after she returned from the seminar and reviewed the resource materials which she had received. (Geis Affidavit, par. 3, App. 224). It became clear to Geis from reviewing the materials that sexually oriented businesses including adult cabarets were a source of harmful secondary effects to surrounding areas. As a result, he asked

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1. Citations to the Appendix refer to the Appendix attached to Petitioner's brief.

Ellison to begin preparing legislation to zone areas within Union Township for sexually oriented businesses. At that time, there were no sexually oriented businesses in Union Township. (Geis Affidavit, par. 3, 4, App. 225).

In early November, 1995, at the direction of the Township Trustees, Geis began to review the procedures associated with adopting legislation to regulate sexually oriented businesses. On November 23, 1995, Geis sent out notices regarding public hearings for the purpose of establishing rules and regulations for adult cabarets and massage parlors. (Geis Affidavit, par. 6, App. 225). On December 9, 1995, the adult cabaret, Rumors, opened. The first public hearing was conducted December 12, 1995, and a second public hearing was conducted December 26, 1995, regarding adult cabarets and massage parlors. The overwhelming majority of the citizens who spoke at those public meetings were in favor of legislation regulating sexually oriented businesses. (Geis Affidavit, par. 4; App. 224-225).

At the meeting of December 26, 1995, the Union Township trustees passed Resolution 95-21. The intent of the resolution was not to prohibit adult cabaret's from operating, to regulate expression or even to make the operation of a sexually oriented business more difficult. Rather, the objective of the legislation was to insure that proper safeguards were in place to minimize the harmful secondary effects of sexually oriented businesses. (Geis Affidavit, par. 5, App. 225).

Geis drafted Union Township's first adult cabaret ordinance, Resolution 95-21, with the help of David Frey, a lawyer with the Clermont County Prosecutor's Office. The legislation was drafted for the sole purpose of limiting

harmful secondary effects of adult cabarets. The legislation was passed December 26, 1995, and was to go into effect January 26, 1996. Plaintiff, Old 74 Corporation, dba Rumors, challenged Resolution 95-21 by filing a Complaint and asking for declaratory and injunctive relief and a Motion for Temporary Restraining Order on January 25, 1996. That case was litigated in federal court and summary judgment was granted in favor of plaintiff, ruling the Resolution unconstitutional.

In reaching its decision, the Court expressly found that the resolution did not restrict expressive activity on the basis of its content. However, the Court concluded due to an ambiguity in the language of the resolution there was not a sufficient time limit placed upon Union Township in making a decision upon an application. As a result, the Court ruled the resolution lacked required procedural safeguards and was therefore unconstitutional. That decision was appealed by defendant to the United States Court of Appeals for the Sixth Circuit. In a 2 to 1 decision, the Sixth Circuit affirmed the decision. *Old 74 Corp. v. Union Tp. Bd. of Trustees*, 166 F.3d 1214 (6th Cir. 1998).

Following the decision of the Sixth Circuit, Union Township amended its resolution to address the concerns of the trial court and the Sixth Circuit. Resolution 99-15 was enacted to amend and replace the original ordinance regulating adult cabarets and was passed by the Union Township Board of Trustees on August 10, 1999, to become effective September 9, 1999. Resolution 99-15 was enacted for the same purposes that Resolution 95-21 had been enacted. (Geis Affidavit, pp. 11-12, App. 227; *see also* Resolution 99-15 and introductory paragraphs, App. 140-142).

Before Resolution 99-15 was enacted, plaintiff in this case, Deja Vu of Cincinnati, began operating in the location where Rui..ors had previously operated. De Ja Vu filed a complaint attacking numerous provisions in Resolution 99-15. After extensive briefing and oral argument, the district court entered its Memorandum and Order granting in part and denying in part plaintiff's Motion for Preliminary Injunction on September 28, 2000. Plaintiff filed a Motion to Alter or Amend that decision which was denied by the Court. Plaintiff also filed a Motion to Stay which was denied by the Court.

In its decision, the District Court found the majority of Resolution 99-15 constitutional. However, the Court found certain provisions of the resolution requiring the disclosure of personal information relating to every partner of a partnership applicant or every shareholder of a corporate applicant were impermissibly broad and enjoined enforcement of those provisions. In addition, the Court found the inspection provisions violated the Fourth Amendment and enjoined enforcement of those provisions as well. The Court found the objectionable provisions were severable from the resolution.

Following the decision of the Court, Union Township passed Resolution 00-22 which amended and replaced Resolution 99-15 and became effective December 28, 2000. Resolution 00-22 did not contain the provisions which the district court found were likely to be held unconstitutional. In addition, Resolution 00-22 eliminated personal disclosure provisions which had been found constitutional by the District Court.

On appeal, a panel of the Sixth Circuit considered Resolution 00-22 and reversed in part and affirmed in part the decision of the District Court. *Deja Vu of Cincinnati, LLC v. Union Township Board of Trustees*, 326 F.3d 791 (6th Cir. 2003). The Sixth Circuit ruled the Township's resolution was unconstitutional because it did not provide for prompt judicial review of an adverse licensing decision and that the hours of operation provision violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The Court also found that the disclosure of information provision did not violate the First Amendment and that the resolution's provisions were not unconstitutionally vague. Finally, the Court ruled that Deja Vu did not have standing to contest the civil disability provision of the resolution.

Union Township and the Attorney General both filed Petitions for Rehearing *En Banc* which were granted by the Court. In its decision *en banc*, the Court affirmed the District Court's decision to deny in part the preliminary injunction and expressed no opinion on the District Court's decision to grant in part the preliminary injunction in light of Union Township's subsequent modification of the resolution. The Court found that the ordinance provided prompt judicial review for two reasons. First, the Court examined the resolution pursuant to the analysis set forth in *City of Littleton v. ZJ Gifts D-4, LLC*, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004), and found that the resolution fulfills *Littleton's* requirements for prompt judicial review. The Court found that the resolution contained an additional safeguard which was not contained in the ordinance upheld by the Court in *Littleton* which was the issuance of a temporary permit. The issuance of that permit allowed the petitioner to operate pending the outcome of any judicial review.

The Sixth Circuit *en banc* applied the four part test set forth in *O'Brien* and reaffirmed in *City of Erie* to the hours of operation provision in the resolution. The Court concluded that Union Township's hours of operation provision was designed to combat the harmful secondary effects of nude dancing and therefore served a substantial governmental interest. The Court also found that the hours of operation provision was narrowly tailored and left open ample alternative channels for communication. The Court applied the same test to the disclosure of information provisions and found that they were constitutional. The Court found that petitioner did not have standing to contest the civil-disability provisions and found that the resolution was not impermissibly vague.

REASONS FOR DENYING THE PETITION

A. This Court has provided clear guidance with respect to the level of scrutiny to be applied to resolutions regulating the secondary effect of adult businesses.

This Court has already devoted substantial time and effort to analyzing the First Amendment as it applies to adult entertainment. This is in spite of the fact that this Court has characterized nude dancing as being expressive conduct "within the outer perimeters of the First Amendment". *Barnes v. Glen Theater*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).

In *Renton v. Playtime Theaters, Inc., supra*, this Court ruled that an ordinance aimed at the secondary effects of theaters which showed sexually explicit movies was "content neutral." The Court concluded the ordinance served a substantial governmental interest and allowed for reasonable

alternative avenues of communication and was therefore constitutional.

Five years later in *Barnes v. Glen Theater*, *supra*, this Court considered an Indiana statute which banned nudity in public places. In ruling that the statute was not unconstitutional, the Court applied the test set forth in *United States v. O'Brien*, *supra*. The Court found that the statute was a legitimate exercise of governmental power, furthered the substantial governmental interest of protecting a societal interest in order and morality and was narrowly tailored to serve that governmental interest. In fact, the Court stated: "Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the state's purpose."

In *City of Erie v. Pabst AM*, *supra*, this Court again had occasion to consider a statute banning nudity in public places, this time in Pennsylvania. In ruling that the statute was not unconstitutional, this Court again applied the test set forth in *O'Brien*. The Court ruled that the statute's purpose was to prevent or limit the harmful secondary effects of nude dancing and therefore served a substantial governmental interest. The Court further found that since the dancers were free to perform wearing pasties and G-strings, the effect on overall expression was de minimus. As a result, the ordinance was narrowly tailored and left open ample alternative means of communication.

In *Barnes*, the Court noted that the test set forth in *O'Brien* was essentially the same test which the Court used in *Renton v. Playtime Theaters, Inc.*, *supra*. In *City of Los Angeles v. Alameda Books*, *supra*, the Court again applied the same test to adult businesses. The Court found that an

ordinance which regulated the number of adult businesses in a building was aimed at the negative secondary effects of such business and therefore served a substantial governmental interest. Justice Kennedy, in his concurring opinion, agreed that the central holding of *Renton* is sound that a zoning resolution "designed to decrease secondary effects and not speech shall be subject to intermediate rather than strict scrutiny."

This Court has given ample guidance to federal courts in determining whether ordinances regulating adult businesses are constitutional. The reality of this case is that Union Township's resolution only regulates nude dancing and does not apply to dancing in G-strings and pasties similar to those ordinances in *Erie* and *Barnes*. Further, the ordinance allows adult cabarets with totally nude dancing to remain open from Noon to Midnight seven days each week. Restrictions on hours of operation have been upheld in *Richmond Book Mart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998), *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *Ben Rich Trading v. City of Vineland*, 126 F.3d 155 (3rd Cir. 1995); *DiMa v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady J Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *Mitchell v. Comm'n. on Adult Enter. Est. of the State of Delaware*, 10 F.3d 123 (3d Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986), and *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003). In *Maricopa County*, the Ninth Circuit specifically rejected Justice Kennedy's proportionality analysis in *Alameda Books* noting that "because five members of the Supreme Court agreed that 'the central holding of *Renton* is sound' we applied the judicial three part test in order to determine the constitutionality of § 13-1422."

In deciding this case with reference to the hours of operation provision, the *en banc* Sixth Circuit cited the statement in *Maricopa County* that: "Six other circuits have had occasion to consider similar restrictions, and all have found such restrictions to be constitutional." Contrary to petitioner's argument, the circuit courts are not conflicted on this issue and have received ample guidance from this Court regarding the proper analysis of the hours of operation provision.

This Court has charged the judiciary with determining whether the ordinances are narrowly tailored. That is best done on a case by case basis. In this case, the plaintiff's dancers are permitted to dance 24 hours per day without restriction if they wear pasties and a G-string. If Deja Vu chooses to present totally nude dancing, then the dancers must comply with the minimal restrictions set forth in the resolution including the hours of operation provision. The resolution is narrowly tailored and the hours of operation provision leaves open ample channels of communication.

B. Petitioner does not have standing to attack the civil-disability provisions in the resolution.

In its decision, the Sixth Circuit properly concluded that Deja Vu does not have standing to attack the civil-disability provisions in the resolution. As amended, Resolution 00-22's civil-disability provisions do not apply to employees. Deja Vu has not applied for a permit to operate an adult cabaret and has not alleged that the person or entity applying for the permit is subject to any of the disability provisions. As the Sixth Circuit stated:

> To have constitutional standing necessary to maintain a lawsuit, "(1) a plaintiff must have

> suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be 'fairly traceable' to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury." *Deja Vu of Nashville, Inc.*, 274 F.3d at 389.

In *F/W PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), this Court found petitioner did not have standing to attack the civil-disability provisions in an adult entertainment ordinance even though the issue had not been raised by the parties. In so ruling, the Court stated that petitioners must allege facts essential to show jurisdiction and standing and that standing cannot be inferred from averments in the pleadings. No such allegations or proof have been presented in this case, and petitioner therefore does not have standing to attack the civil-disability provisions in the resolution.

The trial court applied the four part test in *O'Brien* to the civil-disability provisions and held they were not unconstitutional. Regardless, Union Township eliminated the requirement for the disclosure of the names of employees in the application and for the revocation of a license based upon prior criminal convictions of employees. Union Township eliminated those provisions even though the District Court ruled that there was a substantial likelihood that the provisions were constitutional. Union Township has no intention to re-enact those provisions and petitioner therefore lacks standing to challenge them.

C. Resolution 00-22 is not impermissibly vague.

This Court has adequately set forth the test to determine when a resolution is void for vagueness. In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), this Court stated "an enactment is void for vagueness if its prohibitions are not clearly defined." The Sixth Circuit cited that language in ruling that Union Township's resolution was not vague. The terms attacked by petitioner such as "reasonable cause" and "adequate supervision" are terms which are commonly used in both legal and common language and are sufficiently clear so that a reasonable person can understand their meaning. It would be impossible to draft a resolution meeting the mathematical precision demanded by petitioner. The resolution is not impermissibly vague and it is not necessary for this Court to further define the standard by which such resolutions are judged for vagueness.

CONCLUSION

Based on the foregoing, Respondents, Union Township Board of Trustees, Kenneth Geis, in his official capacity as Administrator of Union Township, and the Union Township Police Department, respectfully request that the Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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No. 05-374

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In The
Supreme Court of the United States

DÉJÀ VU OF CINCINNATI, LLC,

Petitioner,

v.

UNION TOWNSHIP BOARD OF TRUSTEES; KENNETH GEIS; UNION TOWNSHIP POLICE DEPARTMENT; and JIM PETRO, ATTORNEY GENERAL OF THE STATE OF OHIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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I. PETITIONER'S CHALLENGE TO THE CIVIL DISABILITY PROVISIONS WAS NOT RENDERED MOOT BY THE ENACTMENT OF THE MODIFICATIONS CONTAINED IN RESOLUTION 00-22.

In arguing that the modifications created by the enactment of Resolution No. 00-22 ("Res. 00-22") rendered Petitioner's challenges against the constitutionality of the civil disability provisions moot, the Union Township parties (sometimes collectively simply the "Township") in their Brief in Opposition ("Opposition") miss the most salient fact. The amendments to the civil disability provisions as contained in Res. 00-22 simply ***do not conform to the Ohio enabling statute***.

While Res. 00-22 engrafts a three year disability for violations under Ohio Revised Code Chapter 2907 (Res. 00-22(F)(2)(e) (Pet. App. 162)), the enabling law for this disability – found in Ohio Rev. Code § 503.55(C) (Pet. App. 129-130) – ***contains no such limitation***. In fact, that statute ***mandates*** that if a township has adopted a resolution under Ohio Rev. Code § 503.52 (as Union Township has obviously done here), the board of trustees "***shall deny*** any application for a permit to operate an adult cabaret or revoke a previously issued permit" if any person "named on the application ***has been convicted of or plead guilty to any violation of Chapter 2907 of the Revised Code***" or any substantially equivalent law of any state. Ohio Rev. Code § 503.55(C) (emphasis added). There is no time limit for the *statutory* disability. Thus, if the person has ***ever*** been convicted of such crimes, the board of trustees ***must*** deny the permit.

This means that the circumstances of John Doe II (the individual who owns more than 2% of the membership

interest in Déjà Vu of Cincinnati, LLC ("Deja Vu"), and who was convicted of obscenity-related charges in North Carolina in 1991) ***still*** disable the Petitioner from obtaining a permit under the enabling statute. While Res. 00-22 deleted the application disclosure of individuals owning 2% or more of the stock of a corporate applicant as was required in Res. 99-15(D)(5)(e) (Pet. App. 144-45), that provision ***too*** fails to conform to the enabling statute.

Ohio Rev. Code § 503.54 ***requires*** that an application for a permit to operate an adult cabaret (it "***shall*** include all of the following . . . " (emphasis added)) identify "any stock holder holding more than two percent of the stock of a corporate applicant. . . . "[1] Accordingly, John Doe II must be disclosed on the application pursuant to the statute, and he precludes Deja Vu from obtaining a permit under that same statutory scheme. And, Petitioner's complaint challenged the constitutionality not only of Res. 99-15, but of the enabling statute as well. *See*, ¶¶'s 15, 28, 30, 32-33, and 35 (Pet. App. 196-200).

The fact that the Township now professes to this Court that it has no intention of re-enacting the deleted provisions of the *Ordinance* (not that such a statement would be binding on the Township in the future anyway) is therefore beside the point, and is irrelevant to the standing issue.

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[1] Deja Vu is a limited liability company and not a corporation. If such an entity is considered a partnership – as opposed to a corporation – for purposes under the enabling statute and the Resolution, the outcome is the same because John Doe II would be considered to be a "partner" who would have to be disclosed on the application. Res. 00-22(D)(5)(d) (Pet. App. 159); and Ohio Rev. Code § 503.54(C) (Pet. App. 128-29). *See also* the discussion of John Doe II in n.2, *infra*.

Because the enactment of Res. 00-22 did not occur until the appeals to the Sixth Circuit had already been filed, and because the district court took no further action in this matter during the pendency of the appellate proceedings, Deja Vu did not have the opportunity to previously raise in the district court the invalidity of these provisions of Res. 00-22 in light of the limitations as are contained in the enabling statute.[2] Subsequent to the *en banc* ruling of the Sixth Circuit, however, the district court convened a scheduling conference, pursuant to which Deja Vu has filed – after the submission of the petition here – a motion to amend its original complaint to now be able to litigate its challenges to Res. 00-22. These new claims include the contention that the amendments created by the enactment of Res. 00-22 are invalid as a result of their divergence from the requirements of state law.

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[2] While the disability for convictions under Ohio Revised Code Chapter 2907 in Res. 99-15 had a five year limit as opposed to the three year time-frame as contained in Res. 00-22, Petitioner did not challenge the invalidity of the Res. 99-15 provision for failing to conform to the enabling statute because Union Township had "covered" this infirmity by including in Res. 99-15 the requirement that an application had to contain a statement that the persons named therein "*have never been*" convicted of or plead guilty to offenses under Ohio Revised Code Chapter 2907 or substantially equivalent laws. Res. 99-15(D)(5)(g) (Pet. App. 145). That provision was, however, deleted by way of the enactment of Res. 00-22. Moreover, for business reasons having nothing to do with legal standing issues, on September 17, 2004, the individual identified herein as John Doe II was elevated to be the lawful "manager" of the Petitioner limited liability company. Accordingly, he would be the proper person to sign the application for Deja Vu, and would be subject to all of the Resolution's requirements dealing with individuals "named on the application," including the civil disability provisions. But, as previously stated, under the enabling statute he disables the Petitioner from obtaining a license.

In light of the fact that the civil disability provisions of Res. 00-22 do not conform to the enabling statute, and as a result the conviction of John Doe II continues to preclude Deja Vu from obtaining a permit pursuant to the terms of that statutory scheme, Petitioner clearly then still has standing to challenge these disabling requirements, and its constitutional claims in this regard are not moot. Moreover, because the enabling statute applies to all townships throughout the State of Ohio, because it contains the draconian provision that a conviction under Ohio Rev. Code Chapter 2907 or a substantially similar law anywhere in the country effectuates a ***lifetime*** ban from being able to obtain a permit to engage in these forms of constitutionally protected expressive activities, and because Deja Vu challenged the constitutionality of the enabling statute from the outset of this litigation, this Court should grant the petition on this issue.

II. THE HOURS-OF-OPERATION RESTRICTIONS ARE UNCONSTITUTIONAL.

The Township argues that the hours-of-operation restrictions are not unconstitutional because the Petitioner can stay open as long as it wants so long as the entertainers wear at least pasties and G-stings. Opposition, pp. 9-10. This argument is unavailing for a number of reasons.

First, it is factually inaccurate. "Nudity" is defined in the Ordinance, in part, as the showing of the "buttocks with less than a fully opaque covering. . . . " Res. 00-22, § A(4)(a). Accordingly, performing in a G-string is still presenting "nudity" (as the buttocks would not be fully

covered), and the hours-of-operation restrictions still then apply.

Second, the Sixth Circuit, in its en banc ruling, does not make this distinction. It upholds ***closing*** requirements. It says nothing of the fact that if entertainers are performing in the nude during the day, but not at night, that the facility is not then a defined "Adult Cabaret" subject to all of the terms of the Ordinance.[3] In addition, a facial reading of Res. 00-22 does not necessarily provide such an interpretation.

Third, even if true, this still means that Deja Vu and the entertainers who perform in its establishment are not permitted to engage in the type of constitutionally protected entertainment activities that they desire to present during the restricted hours. And, from a constitutional perspective, there is, therefore, nothing to preclude Union Township or the State of Ohio from enacting a law limiting, for example, topless (or even G-string) dancing to only one hour of the day under this "interpretation."

It is in this regard that the Respondents are therefore in error when they contend that because Union Township could ban nude and topless dancing outright, it can therefore impose the hours-of-operation restrictions at issue. Opposition, pp. 8-9. The Township might have an argument if the "greater-includes-the-lesser" standard from *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986), was still good law. However, it is not.

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[3] *Cf.*, Pet. App. 109-110 (district court finding that the Ordinance is not unduly restrictive because entertainers can dance after midnight by putting on "minimal covering . . . ").

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), this Court rejected *Posadas'* "greater-includes-the-lesser" concept as being "inconsistent with both logic and well-settled doctrine." *Id.* at 511. *See also id.* at 510-13, and cases cited therein. In disapproving Rhode Island's argument that because it had the power to ban the sale of liquor entirely it could then preclude advertisements of liquor prices, the majority observed that "[a]s the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive." *Id.* at 513. *See also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762-64 (1988) (four Justice majority rejecting a "greater-includes-the-lesser" argument as being a "legal slight-of-hand," and ruling that merely because the government had the right to totally preclude newsracks on public sidewalks, it did not have the right to require a license for the location of such devices which could be denied in the discretion of governmental officials).

Fourth, the argument of the Respondents is in conflict with their earlier contention – apparently accepted by the Sixth Circuit – that the reason that the Township exempted liquor establishments from the terms of Paragraph (M) (the hours-of-operation restrictions) was because it was without the power to regulate such establishments. *See* Pet. App. 23. Given this assertion, however, the pasties and G-string statement misses the mark.

Since the Respondents assert that the limitations as set forth in Paragraph (M) do not require *closure* of a business during the designated hours, but only modification of the form of entertainment presented therein, the Township could certainly command that all "adult cabarets," *including liquor establishments*, change their

entertainment at midnight as well. This would not effect the closing hours of liquor establishments at all,[4] and Union Township simply cannot have it both ways in these diametrically opposite arguments.

Finally, Respondents assert that the lower courts have "received ample guidance from this Court regarding the proper analysis of the hours of operation provision." Opposition, p. 10. But the only decision of this Court addressing hours-of-operation restrictions in the area of sexual expression is that of *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). That opinion imposed strict scrutiny and ruled that "hours" restrictions of erotic cable television were unconstitutional because there was a "significant restriction of communication, with a corresponding reduction in Playboy's revenues." *Id.* at 809.

Petitioner put on evidence to meet these standards (see petition at 8), but this did not sway the appellate court below. In addition, the other cases upholding these types of provisions – as are listed in both the petition and in the Opposition – obviously do not follow this Court's ruling in *Playboy*, and uphold a wide and varying array of

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[4] Moreover, the Ohio Liquor Code and Regulations only control the permissible hours for the *sale of intoxicating beverages*; not the times when liquor licensed establishments can be open or must be closed. Ohio Rev. Code § 4301.22; Ohio Admin. Code § 4301:1-1-49. In fact, the statute even acknowledges that it does not preclude local municipalities from adopting "a closing hour *for the sale of liquor*" earlier on Sunday than as set forth in the code. Ohio Rev. Code § 4301.22(C) (emphasis added).

such restrictions. Accordingly, further guidance from this Court is warranted.

CONCLUSION

For the reasons contained herein and in the petition, Deja Vu respectfully requests this Honorable Court to grant the writ.

December 2, 2005

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